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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. .....

THE NEW YORK CENTRAL RAILROAD COMPANY,

Appellant,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

This appellant, an intervening plaintiff in the court below, appeals from the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, upholding in part an order of the Interstate Commerce Commission, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

By order dated December 13, 1965, as amended, the time for docketing this appeal was extended by the lower court to January 17, 1966.

Opinion Below

The opinion of the District Court was handed down on August 20, 1965, is reported at 244 F. Supp. 955, and is set forth in Appendix A hereto.

The decision of the Interstate Commerce Commission was issued on March 16, 1964, is reported at 322 I.C.C. 301, and is set forth in Appendix B hereto.

Jurisdiction

This suit was brought under 28 U.S.C. § 1336, 1398, 2284, 2321-2325, and 5 U.S.C. § 1009 to set aside an order of the Interstate Commerce Commission. The judgment of the three-judge District Court was entered on August 20, 1965, and this appellant's Notice of Appeal was filed in that court on October 18, 1965.

The jurisdiction of the Supreme Court to review this decision on direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b) and is sustained by the following decisions: *Minneapolis and St. L. R. Co.* v. *United States,* 361 U. S. 173 (1959); *United States* v. *Drum,* 368 U. S. 370 (1962); and *Interstate Commerce Commission* v. *J. T. Transport Co.,* 368 U. S. 81 (1961).

Questions Presented

1. Where the subsidiary, affiliate or agent of any railroad leases a container or trailer to a shipper and the shipper thereafter utilizes the trailer in a movement by rail under published rates applying on shipper-furnished containers or trailers, is the railroad or its subsidiary in so leasing acting in the capacity of a common carrier of property subject to the provisions of the Interstate Commerce Act?

Stated otherwise, may the Interstate Commerce Commission require the terms and charges for such leasing to be published in the railroad's tariffs?

2. When the record shows that regulated motor carriers and freight forwarders (or the subsidiaries, affiliates, or agents thereof), all parties to the proceeding before the Commission, are also leasing trailers to shippers for the same uses in subsequent railroad movement, is the Commission's failure to extend the requirement of publication to such other regulated forms of transportation a discriminatory application of the Interstate Commerce Act contrary to the National Transportation Policy?

Statutes Involved

The statutes involved are the National Transportation Policy, §§ 1(1)(a), 1(3)(a), 1(4), 6(1) of the Interstate Commerce Act and Section 10(e) of the Administrative Procedure Act. (49 U.S.C. preceding §§ 1, 301, 901, and 1001; 49 U.S.C. § 1(1)(a); 49 U.S.C. 1(3)(a); 49 U.S.C. 1(4); 49 U.S.C. 6(1); 5 U.S.C. 1009(e)). These statutes are set forth in appendix C hereto.

Statement

In the culmination of an investigation of railroad trailer-on-flat-car service (TOFC) begun on its own motion on June 29, 1962, the Interstate Commerce Commission, on March 16, 1964, prescribed a number of rules designed to govern use and operation of such service for the future. The prescribed rules were identified in Appendix IV to the Commission's decision as 49 CFR 500.—

Upon the filing of complaints in the court below by the nation's railroads and certain freight forwarders, the

effective date of the rules was stayed pending judicial disposition of the matter.

The Court below annulled and enjoined Rules 500.2 and 500.3, but upheld the validity of the other two rules under attack, Rules 500.5 and 500.7(a).

This appeal is solely concerned with the validity of Rule 500.7(a) which in substance requires railroads, their subsidiaries, etc., to publish in their common carrier tariffs all of the rates, charges and rules governing the leasing of equipment or other ancillary services provided to any person using its TOFC service when such services are in addition to the linehaul transportation charges already published in the tariff.

The term "in addition to the linehaul transportation charges" requires a brief description of the five universally recognized forms of TOFC service: Plans I, II, III, IV and V.

In Plan I, certain railroads handle trailers tendered by motor carriers in substituted rail-for-motor service. The charges are privately agreed upon between rail and motor carriers and the arrangement is recognized by the Commission as a form of joint rail-motor rates. The charges to the shippers are the motor carrier rates published in that carrier's tariffs. The use of Plan I is at the option of the motor carrier, absent a contrary instruction from the shipper.

In Plan II, the railroad tariffs offer a complete door-to-door service, including loading and unloading of the freight from and to shipper platforms. These rates were originally published on the same level as motor common carrier rates and, in general, still reflect that basis.

In Plan III, the railroads publish a flat charge solely for the ramp-to-ramp movement of shipper-furnished trailers. These rates were approved by the Commission in *Eastern Central Motor Carriers Assn.* v. *B. & O.*, 314 I.C.C. 5,

aff'd sub nom., Cooper-Jarrett, Inc. v. *U. S.*, 226 F. Supp. 318, *aff. per curiam* 379 U. S. 6 (1964).

In Plan IV, the same type of Plan III ramp-to-ramp charge is published for the movement of shipper-furnished trailers and flatcars.

Plan V rates are ordinary joint rail-motor rates wherein each carrier operates in its own right over a portion of its own route. The use of the particular rate and route is dictated by the shipper, no option remaining to the carriers.

The thrust of Rule 7(a) is directed primarily at Plan III. Since many shippers wishing to use Plan III rates had no trailers of their own, the railroads, either directly or through a subsidiary, began to lease such equipment to shippers. The leases were made on a per-trip basis. For example, the standard charge for a trailer lease in the east is $20 per trip, representing a normal 2-day movement at $10 per day. These leases also provide for certain free time prior and subsequent to the rail haul and detention charges when the trailers are held beyond such periods. These charges, having nothing to do with the Plan III rates themselves, were never published in tariff form. Rule 7(a) would require such publication.

Appellant's opposition to publication did not and does not stem from any reluctance to disclose its charges. They are, in fact, well known, both to the shipping public and to appellant's competitors. Appellant, moreover, has suggested throughout the proceeding that the Commmission could just as well exercise supervision of trailer leasing by a rule requiring all such arrangements to be kept on file with the Commission's Bureau of Inquiry. The dissenting opinion of Commissioner Webb confirms that this would serve the announced purpose of Rule 7(a). (Appendix B, pp. 183-184).

Without reviewing either the legal authorities or the practical problems involved, however, the Commission found that when a railroad:

> "proceeds to lease trailers . . . all the services it provides become *transportation* services rather than mere accessorial services, and they are required to be the subject of its tariff publications." (Appendix B, p. 141).

Not only were the railroads commanded to publish such leasing charges when the leases were made directly to the shipper by the railroad, but the rule was extended to cover all railroad subsidiaries, agents, affiliates, etc., whereas the examiner's recommended rule would have applied only to the railroads themselves. No such restraining hand, however, was placed upon motor carrier or forwarder subsidiaries, affiliates or agents.

Appellant's practical opposition to Rule 7(a) is simple. While most railroads engaging in TOFC service haul standard highway trailers with fixed rear wheel assemblies, appellant has pioneered in the development of a new type of interchangeable rail-highway equipment which is now known generally in trade circles as Flexi-Van. While a flexi-van trailer with its rear wheel assembly attached bears all the outward appearances of a standard trailer and can be hauled over the streets and highways as such, only the box portion of the trailer is involved in the railroad haul. Upon loading at the appellant's flexi-van terminal, the rear wheel assembly is detached and the box portion is pushed on to a turntable at a 90-degree angle with the car. The turntable is then revolved and aligned with the direction of the car.

This method had several major advantages. It eliminated the necessity for hauling several thousand pounds of dead weight represented by the rear wheel assembly or "bogey". The flexi-van box itself had a lower center of

gravity, permitting higher speed on curves. The bogey was immediately free to be used with another flexi-van box at the ramp site with the result that only one rear wheel assembly was necessary in connection with each three flexi-van boxes. Since only the rear wheel assembly required licensing, moreover, additional sums had been saved on the one-for-three ratio of assemblies to boxes.

The flexi-van cars equipped with turntables, however, are not suitable for the handling of standard highway trailers with fixed rear wheel assemblies, and at the time the Commission instituted this investigation, appellant had already invested $30 million in this equipment.

While flexi-van equipment may be purchased on the open market and a limited number have in fact been purchased, the primary source of flexi-van trailers is the supply owned by appellant's subsidiary, The New York Central Transport Company. Thus, the provisions of Rule 7(a) would cover practically all flexi-vans now in use.

On the other hand, motor carrier affiliates and freight forwarders are—and would remain—free to lease standard highway equipment for standard TOFC service via other railroads at whatever price is convenient at the moment. Publication of leasing charges, therefore, would simply freeze appellant's ability to remain competitive.

The Commission, without any discussion of the legal precedents, concluded that the practice of leasing flexi-vans was a "transportation" service under the Act on the theory that railroad TOFC service is in fact some kind of a hybrid "which can physically be performed only with motor vehicles", and that such services would normally be transportation services when offered in connection with TOFC. The Commission, however, completely disregarded the fact that regulated motor carriers and freight forwarders, all parties to this proceeding, were themselves providing trailers to shippers at non-published charges for use in standard TOFC.

The court below limited the extent of Rule 7(a) to cases in which the railroad leased trailers for use in its own TOFC service and, with such limitation, concluded that the rule was supported by the provisions of Sections 1(3)(a) and 6(1) of the Interstate Commerce Act. It remanded the matter to the Commission to clarify its intent if a broader interpretation should be deemed necessary.

Neither the opinion of the Commission nor that of the court below reviewed the authorities limiting the jurisdiction of the Interstate Commerce Act insofar as railroads are concerned. Nor did either even comment upon the obviously discriminatory situation created wherein all of appellant's specialized equipment is placed under regulation while equipment supplied from other sources subject to the Commission's jurisdiction is left free to be priced on the spur of the moment.

Following the Commission's decision of March 16, 1964, appellant's worst fears were realized. On September 24, 1964, appellant petitioned the Commission for leave to submit additional evidence at a further hearing on the subject of trailer-leasing practices conducted by other modes. The affidavit submitted with the petition detailed the competitive leasing practices being conducted by motor carriers and regulated freight forwarders in the St. Louis area which had, subsequent to the close of the record, resulted in a substantial loss of Plan III traffic to appellant. The affidavit established that had Rule 7(a) been in effect, appellant's Plan III traffic would have swiftly been diverted to other carriers even though appellant's Plan III ramp-to-ramp rates were the same as any other railroad's. Only the ability of appellant's subsidiary to quickly reduce its own trailer-leasing charges at St. Louis—for all shippers—prevented the complete loss of its Plan III traffic which was then returning gross revenue of over $100,000 per month.

By order of December 21, 1964, the Commission denied appellant's petition:

> ". . . for the reason that the said petition fails to justify the modification at this time of Rule 500.7(a) previously adopted herein."

On June 26, 1965, the court below granted appellant leave to amend its complaint to include therein an additional allegation of error based on the Commission's order of December 21, 1964. The court's opinion, however, makes no mention whatsoever of the obviously discriminatory situation and appellant's dilemma resulting therefrom.

The Questions Are Substantial

At the outset it should be noted that there is no occasion here for the application of the Commission's policing powers, the use of which is only permissible on a demonstrated record of violations of the Act. *Southern Pacific* v. *I.C.C.*, 200 U. S. 536, 553 (1906). To the contrary, the record here affirmatively shows and the Commission's decision recognizes that trip-leasing of trailers has already become standardized, that there has been no instance of a shipper being refused the use of available trailers, and that the charges for trailer leasing by railroads are for all practical purposes the same without publication. Thus, the Commission in referring to "potential seeds of discrimination" nevertheless admits that:

> "The record before us is almost completely devoid of evidence that these opportunities for discrimination have been misused." (Appendix B, p. 141).

I.

Jurisdiction of the Commission.

Section 1(1)(a) of the Interstate Commerce Act specifically limits the application of that legislation to "common carriers engaged in . . . The transportation of passengers or property wholly by railroad . . ." As the Commission itself put the matter in *Propriety of Operating Practices—New York Warehousing*, 198 I.C.C. 134, 195 (1933):

> "The function and jurisdiction of the Commission is the regulation of commerce and not the regulation of railroads, except insofar as they are instruments of commerce."

In that decision the Commission specifically defined the direct or indirect furnishing of the storage and warehousing facilities there involved as "not within its railroad's common carrier duty" (p. 195). The decision was thereafter upheld in *Baltimore and Ohio Railroad* v. *U. S.*, 305 U. S. 507 (1939).

A railroad's common carrier duties under any particular rate, however, are defined by its tariff, and under the Plan III tariffs, the cargo does not come into the possession of the railroad unless and until it is delivered in the shipper's trailer at the railroad's TOFC loading site. Up until that moment, the shipper is free to make whatever arrangements it wishes for the loading of the cargo into the trailer at its platform, for the procurement of the trailer, and for the draying of the trailer between its platform and the railroad site. The same options are available, of course, beyond the railroad destination site.

This court has held upon a number of occasions, that "transportation" under the Interstate Commerce Act does not begin until the merchandise has been placed in the possession of the carrier. In *Pennsylvania Railroad Company*

v. *P.U.C.O.*, 298 U. S. 170 (1936), the court stated at pages 174-175:

> "For many purposes as for example in testing the validity of state taxation, merchandise is deemed to be in interstate commerce when it has started on its journey, though still in the possession of consignor or seller . . . not so, however, in determining the application of this act. Transportation begins for that purpose, if not for others, when the merchandise has been placed *in the possession of a carrier* . . . The transportation between Pennsylvania and Ohio was by the owner, who was not a common carrier, but furnished implements of carriage for its own use exclusively . . . Appellants would have us hold that this interstate transportation . . . will be tacked to the intrastate transportation by railroads . . . and the movement thus consolidated brought within the statute. The statute and the decisions as we read them forbid this unifying process." (Emphasis added.)

For "transportation", as above defined, to begin, the railroad must then be acting as a "carrier" and not simply as a private contractor in performing other functions. Thus, the cargo—in this case a loaded trailer furnished by the shipper—must be tendered into the possession of the railroad at the TOFC ramp. Functions performed prior to tender of such cargo into the possession of the railroad and after the railroad has released possession of the cargo are clearly not "transportation" services being rendered by a railroad as a common carrier of property.

The same conclusion was reached in *Walling* v. *Baltimore Steam Packet Company*, 144 F. 2d 130 (1944), wherein the court stated at page 134:

> "The phrase 'services in connection with' is used in Section 1(3), 6(7) and 15(13) of the Interstate

> Commerce Act . . . and, as so used, it has uniformly been construed to mean service rendered while a shipment is in the custody and control of the carrier or service which the carrier is legally obliged to perform."

See also *Pennsylvania R. Co.* v. *M. McGirr's Sons Co.*, 287 F. 334, cert. denied, 262 U. S. 743 (1923).

As a matter of fact, the Commission itself has previously held that trailer leasing is a non-common carrier service having no place in common carrier tariffs, *Charges For Use of Trailers*, 49 MCC 272 (1949). The opinion there states at page 275:

> "The leasing of trailers is not proper subject matter for tariff publication, and it is not made so by an attempt to connect it with the transportation service which respondent would perform beyond Providence."

The cases cited above constitute ample authority for the proposition that the common carrier function of a railroad does not begin unless and until property is tendered into its custody for "transportation". Both the Commission and the court below have disregarded this fundamental distinction.

The Commission's refusal to recognize that a railroad's "transportation" function occurs only when it is in full possession and control of the property is wholly inconsistent, moreover, with the distinction it makes between the shipper-furnished trailers in Plan III and the railroad-furnished trailers utilized under the higher Plan II TOFC rates. In the latter case, the Commission defines such trailers as "instrumentalities of transportation", but in the case of Plan III, the shipper-furnished trailers are defined as "articles of commerce". *Forwarder Volume Commodity Rates, Chicago and New York*, 308 I.C.C. 455, *aff.*

Eastern Express Inc. v. *U. S.*, 198 F. Supp. 256, *aff. per curiam* 82 S. Ct. 640 (1962). Both the Commission and the lower court failed to adhere to that fundamental distinction here.

This Court should act to preserve the distinction between a railroad acting in its capacity as a common carrier of property and a railroad in the performance of optional ancillary services rendered prior to the tender of cargo and after the release of cargo from the railroad's custody.

II.

Discrimination by the Commission.

The National Transportation Policy of the Congress specifically provides for the:

> ". . . fair and impartial regulation of all modes of transportation . . ."

and its goal encompasses all carriers subject to the Act. *Reddish* v. *U. S.*, 188 F. Supp. 160, *aff. Interstate Commerce Commission* v. *J. T. Transport Co.*, 368 U. S. 81 (1961).

This record affirmatively shows that affiliates, subsidiaries or agents of regulated motor common carriers are leasing trailers to shippers for subsequent use in railroad Plan III service. The record also shows that certain regulated freight forwarders are performing precisely the same function. (See Commissioner Webb's dissent, Appendix B, pp. 183-184.) The record further shows that from time to time these other regulated modes of transportation can and do effectively undercut the standard charges for trip leasing assessed by railroad subsidiaries and that such action has already very seriously jeopardized this appellant's $30 million investment in flexivan equipment.

Assuming, *arguendo*, that the Commission does have the authority to require publication of trailer leasing charges,

the National Transportation Policy requires that such action must be "fair and impartial". *McLean Trucking Company* v. *U. S.*, 321 U. S. 67, 83 (1944).

The rule requiring railroads and their subsidiaries to publish trailer leasing charges in tariff form has the obvious result of preventing any change in such charges upon less than thirty days' notice. Any such changes, moreover, would be forced to run the gauntlet of protests from the very motor carrier and freight forwarder sources which have been and are now performing precisely the same function at whatever charge may suit the convenience of the moment.

All modes were made respondents in this case and could have and should have been treated equally therein. The difference in treatment between the railroads on the one hand and the motor carriers and freight forwarders on the other is obvious and clearly contrary to the specific provisions of the National Transportation Policy.

III.

Conclusion.

The questions presented by this appeal are substantial and are of sufficient public importance as to require plenary consideration with briefs and oral argument for their resolution.

Respectfully submitted,

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January 17, 1966.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT,

FOR THE NORTHERN DISTRICT OF ILLINOIS,

EASTERN DIVISION.

Civil Action No. 64 C 1442.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY; CHICAGO AND NORTH WESTERN RAILWAY COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; CHICAGO GREAT WESTERN RAILWAY COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY; THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY; GREAT NORTHERN RAILWAY COMPANY; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; LOUISIANA & ARKANSAS RAILWAY COMPANY; MISSOURI-KANSAS-TEXAS RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY; NORTHERN PACIFIC RAILWAY COMPANY; ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY; ST. LOUIS SOUTHWESTERN RAILWAY COMPANY; SOO LINE RAILROAD COMPANY; SOUTHERN PACIFIC COMPANY; UNION PACIFIC RAILROAD COMPANY; WABASH RAILROAD COMPANY, THE WESTERN PACIFIC RAILROAD COMPANY;

Plaintiffs,

v.

UNITED STATES OF AMERICA; and INTERSTATE COMMERCE COMMISSION;

Defendants.

August 20, 1965

Before CASTLE, Circuit Judge, HOFFMAN and DECKER, District Judges.

JULIUS J. HOFFMAN, District Judge. Piggyback service —the movement of highway trailers on railroad flatcars—

constitutes "probably the most significant recent development in transportation", in the opinion of the Interstate Commerce Commission. Because of the "explosive growth" of this service in the past five years, the Commission in 1962 instituted on its own motion a proceeding to investigate the subject generally and "to explore new approaches" to its regulation. That proceeding culminated in a Report and Order of the Commission issued under the title *Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, Ex Parte No. 230, reported at 322 I. C. C. 301-417, dated March 16, 1964, rehearings denied June 22, 1964, and December 21, 1964. By this Report and Order, the Commission promulgated eight rules intended to regulate trailer-on-flatcar (TOFC) service. These Rules, herein referred to simply as Rules 1 through 8, are officially designated and reported as sections 500.1 through 500.8 of title 49, Code of Federal Regulations.

This suit was brought to enjoin and set aside the Commission's order on the ground that four of the eight rules issued by the Commission are beyond its authority and unlawful.[1] Pursuant to Sections 2284 and 2321 through 2325 of the Judicial Code,[2] the matter has been tried before a three-judge court. We conclude that the Commission's order must be set aside.

I.

The plaintiffs and intervening plaintiffs are aligned as five separate parties in interest, comprising three groups of railroads, one railroad individually, and a group of freight forwarders. For the defense, the American Trucking Associations, Inc., and some of its members, the Con-

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[1] A motion for a temporary restraining order was withdrawn when the Commission, on its own motion, stayed the effectiveness of its rules until further order.

[2] 28 U.S.C. §§ 2284, 2321-2325, (1948).

tract Carrier Conference, and the National Auto Transporters Association all intervened to join as defendants with the Commission and the United States. Despite this multiplicity, the several plaintiffs are agreed on the main point of the railroads' controversy with their rivals, the truckers, and in their objections to the Commission's new rules.

The primary issue to be decided is the validity of Rules 2 and 3, promulgated by the Commission in its proceeding by a divided vote. Briefly glossed, they require a railroad which offers TOFC service on an open-tariff basis, that is, to the regular shipping public, to make that service available on the same terms without discrimination to motor carriers[3] acting in that capacity in hauling freight, and, as a corollary, authorize the motor carriers to substitute this TOFC service of the railroads for their regular highway transportation by truck. In full, these rules provide:

> 500.2 *Availability to all of TOFC service.*—TOFC service, if offered by a rail carrier through its open tariff publications, shall be made available to any person at a charge no greater and no less than that received from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

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[3] These Rules apply equally to the use of railroad TOFC service by common and contract carriers by water, as by motor vehicle. Since the issues are largely identical, they will be considered by reference only to motor carriers except where different legal principles apply to water carriers. So-called fishyback service—the movement of highway trailers by barge—was severed from this proceeding for separate treatment, as were the practices of motor carriers of automobiles. Birdyback service is not involved.

Appendix A.

500.3 *Use of open-tariff TOFC service by motor and water carriers in the performance of economically regulated transportation.—*

(*a*) Except as otherwise may be prohibited by these rules, motor common and contract carriers, water common and contract carriers, and freight forwarders may utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier.

(*b*) Motor and water common carriers shall utilize open-tariff TOFC service only if their tariff publications give notice that such service may be utilized at their option, but that the right is reserved to the user of their services to direct that in any particular instance TOFC service shall not be utilized.

(*c*) Motor and water contract carriers shall utilize open-tariff TOFC service only if their transportation contracts and schedules make appropriate provision therefor.

(*d*) Tariffs of motor and water common carriers and contracts and schedules of motor and water contract carriers providing for the use of open-tariff TOFC service shall set forth the points between which TOFC service may be performed and the names of the rail carriers whose TOFC service may be utilized.

(*e*) Motor and water common and contract carriers utilizing open-tariff TOFC service in the performance of authorized transportation shall tender traffic to and receive traffic from rail carriers only at points which the motor and water carriers are authorized to serve.

These Rules break new ground. To the present time, the available TOFC service has been divided among five cate-

gories or "plans" which have evolved from the carriers' practices and the Commission's rulings. As capsulized in the Commission's Report, the five plans involve the following arrangements:

PLAN I

Railroad movement of trailers or containers of motor common carriers, with the shipment moving on one bill of lading and billing being done by the trucker. Traffic moves under rates in regular motor carrier tariffs.

PLAN II

Railroad performs its own door-to-door service, moving its own trailers or containers on flatcars under tariffs usually similar to those of truckers.

PLAN III

Ramp-to-ramp rates based on a flat charge, regardless of the contents of trailers or containers, usually owned or leased by freight forwarders or shippers. No pickup or delivery is performed by the railroad.

PLAN IV

Shipper or forwarder furnishes a trailer or container-loaded flatcar, either owned or leased. The railroad makes a flat charge for loaded or empty-car movement, furnishing only power and rails.

PLAN V

Traffic moves generally under joint railroad-truck or other combination of coordinated service rates. Either mode may solicit traffic for through movement.

It will be seen that these five plans can be classed more simply into two groups: the open-tariff plans, numbered

II, III, and IV, available equally to regular shippers and freight forwarders, but not to motor carriers; and the joint intermodal plans, numbered I and V, available only to common carriers, and only through negotiation and voluntary agreement between the rail carrier and the motor carrier. Thus motor carriers and ordinary shippers are differently served under separate plans. Negatively, this separation has foreclosed motor common carriers from the use of the three open-tariff plans. The prohibition implicit in the plans was explicitly declared by the Commission a short while after motor carriers first were brought under federal regulation.[4] Since 1939, this ruling has been reaffirmed in subsequent decisions and observed in practice consistently down to the present time.[5] The established principle and its supporting reasons have come to be summed up in the abbreviated statement that it is repugnant to the Interstate Commerce Act for a motor carrier to act both as a carrier and a shipper as to the same shipment.

The new Rules promulgated by a majority of the Commission would work an abrupt departure from this established principle and from the settled practice. Since joint intermodal service of the kind provided by plans I and V would be continued under new Rule 4, (49 C.F.R. 500.4), the motor common carrier would enjoy the option of both classes of TOFC service, and could choose either open-tariff service without the railroad's consent or concurrence if that rate should be more favorable, or the joint intermodal service if the railroad in negotiation should agree to offer that at a lower rate. The railroads, presently free to bargain with their highway competitors,

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[4] Substituted Freight Service, 232 I.C.C. 683 (1939).

[5] *See* Movement of Highway Trailers by Rail, 293 I.C.C. 93 (1954), and cases there cited.

would be bound to accept whatever TOFC freight their rival carriers might choose to tender. These basic changes in the industry are not, however, inadvertent. The Commission plainly avowed its purpose as "the reexamination of existing Commission precedents and pronouncements"; and it specifically overruled those prior decisions which it found to be indistinguishable and absolutely irreconcilable with its newer view. The issue of power is thus clearly drawn.

II.

In reviewing the authority of the Commission to issue the Rules in question, we are confronted at the outset by the duty to measure the administrative action solely against the statutory grounds invoked by the agency. In the exercise of judicial review, a court is not at liberty to seek its own justification for the Commission's order or to accept appellate counsel's *post hoc* rationalizations.[6] The Commission bears a correlative duty to disclose clearly the grounds on which it acts.[7]

Here we cannot say that the Commission's Report is a model of clarity, guiding the court unerringly to the statutory source of the power relied upon. The Rules are described in the Report as partly interpretive, partly imposing billing and tariff requirements, and partly "to implement the broad provisions of existing legislation", without specification of which ground supports any particular rule. In overruling its earlier decisions which pro-

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[6] Burlington Truck Lines v. United States, 371 U. S. 156, 168-69 (1962); Atchison, Topeka and Santa Fe Ry. v. United States, 209 F. Supp. 35, 45 (N. D. Ill. 1962).

[7] Securities and Exchange Commission v. Chenery Corporation, 318 U. S. 80, 94 (1943); Automatic Canteen Company v. Federal Trade Commission 346 U. S. 61, 81 (1953).

hibited motor carriers from shipping their customers' goods by rail, the Commission "does not doubt that when made they represented sound conclusions." The decisions are now regarded, however, as "incorrect in the light of this record and current conditions." The observation suggests that the Commission now regards itself as vested with a sweeping power to make quasi-legislative rules which it deems appropriate to carry forward the broad policies of the act of Congress, although it declared at an earlier day that "We are invested with no roving commission to carry out the policy of Congress . . ."[8]

It is unnecessary to decide, however, whether the power delegated in Section 12 of the Interstate Commerce Act, authorizing the Commission "to execute and enforce the provisions" of the Act, confers such a general power to make rules to meet changed conditions. The Rules in question here must stand or fall with the interpretation of the Act itself, regardless of altered circumstances in the transportation industry. On one hand, Rules 2 and 3 are simply declaratory of the command of Congress if the Commission is correct in construing the Act to forbid railroad discrimination against motor carriers in the services afforded, and in interpreting the Act as imposing no limits on the power of a motor carrier to avail itself of substituted rail service in its authorized operations. On the other hand, the Rules are invalid as in conflict with the Act, despite changed conditions, if the congressional enactment is read to excuse the railroads from a duty to serve motor carriers equally with ordinary shippers, or to limit the authority of motor carriers to ship their customers' freight by rail without the railroads' concurrence.

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[8] Kansas City Southern Ry. Co. v. Kansas City Terminal Ry. Co., 211 I.C.C. 291, 304 (1935).

We turn first, then, to the interpretation of the relevant statutes, upon the Commission's assumption that the questions are open and may be treated as matters of first impression. We will thereafter consider the effect of the settled line of decision establishing an interpretation contrary to the Commission's revised views.

III.

The only statute mentioned in the Commission's report which could supply affirmative support for Rules 2 and 3 is Section 2 of the Interstate Commerce Act.* Indeed, in considerable part the Commission's Rule 2 is merely a paraphrase of that Section. We may accept, therefore, the argument of counsel for the government, despite the ambiguity of the Report's reference and discussion, that the Commission invoked Section 2 as authority for its Rules.

Section 2 provides in full:

> That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

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* 49 U.S.C. § 2 (1887).

By its terms, this Section deals only with discrimination in rates, and does not extend to a discriminatory refusal to provide service at all. This limitation in scope is not a legislative oversight, however. The next succeeding section of the Act rounds out the carrier's duty of equal treatment, by forbidding discrimination or preferences in the service afforded, in the following terms:

> Section 3(1). It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

It appears, then, that the letter of the law singled out by the Commission as authority for its Rules offers no support, since the ostensible object and effect of those Rules is not to eliminate discrimination in rates under Section 2, but rather to compel the railroads to afford TOFC service to motor carriers if it is provided for others. The provision relevant to this purpose, Section 3, is nowhere cited in the Commission Report. This flaw might not be fatal if Section 3 provided the necessary foundation, since the two sections are plainly complementary and to be read *in pari materia.* But Section 3, by its proviso, specifically

excludes from its coverage "the traffic of any other carrier of whatever description."

Endeavoring to avoid the plain meaning of this proviso, the government relies upon a portion of its complex legislative history. The proviso was enacted in 1940, when it was adopted from a parallel provision of part II of the Interstate Commerce Act, dealing with motor carriers, which had been enacted in 1935.[10] Tracing to this source, the government points to a statement of Senator Wheeler, made in explanation of the language as used in this earlier bill, tending to show that the proviso was intended to allay fears that carriers by competing modes might complain of injury by reason of the low rates of the rival.[11] The Senator expressed his opinion that the fears were not well founded, however, because the basic command of the section had in turn been borrowed from Section 3 of part I (applicable to railroads) as originally enacted *without* the proviso, and because that section had "always been interpreted as covering unequal and unjust treatment by a carrier of its patrons." Reading "patrons" as including carriers who tender freight for shipment, the government's argument proceeds from this observation through the tangle of cross-references to the conclusion that Section 3 *does* protect carriers who seek to use another carrier's services since it is said that the proviso exempts only discrimination against the traffic of other carriers competing on parallel routes for the same business. The plaintiffs point out in response that Senator Wheeler was contrasting "patrons" with "carriers" in his remarks, so the government's major premise—that carriers are "patrons" in the Senator's thinking—is faulty.

At best this legislative history is inconclusive. It seems clear that the Senator did not have in contemplation the

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[10] Section 216(d), 49 U.S.C. § 316(d) (1935).

[11] 79 Cong. Rec. 5656.

status of the carrier that tenders freight to another, and that his comments on this different bill provide only oblique evidence of the meaning of the basic provisions of Section 3(1), which had been enacted nearly fifty years earlier, or of the meaning of its proviso, enacted by another Congress five years later. This evidence of congressional intent is too slender a reed to support a disregard of the broad sweep of the words excluding from the railroad's obligation of equal service "the traffic of any other carrier of whatever description."

Practical problems which would arise under the Commission's interpretation of Section 2 also militate against such a reading. Although the Report emphasizes the value of *coordinated* service by motor carriers and railroads, the Rules promulgated would allow the motor carrier to use any open-tariff TOFC plan, including plan II as well as plan III. Under plan II there is no coordination: the railroad provides complete door-to-door service, with its own tractors and trailers. Thus the motor carrier in using it would abandon any pretense of performing services as a carrier, and would function merely as the customer's agent in calling upon the railroad for its services. Moreover, if the Act required railroads to serve motor carriers and regular shippers without discrimination, there would be no warrant for confining the command to TOFC service. The trucker would be entitled to compel the railroads to carry not only the freight-laden trailer but bulk cargo and boxcar freight as well. The Rules announced, limited as they are to TOFC shipment, would fall far short of the need for guidance were the novel interpretation of the Act to be sustained; the greater need would be for rules to govern the problem of handling freight in other forms. And since Sections 2 and 3 of the Act apply to the transportation of passengers as well as freight, the Commission's interpretation would open

a host of new problems concerning substituted service for passengers. Moreover, the Commission's view of the Act would appear to require intra-modal substituted service, as pointed out by Commissioner Webb in his dissent, by which one railroad could shunt its unprofitable traffic onto a competing railroad, or by which one motor carrier could call upon another for the difficult hauls. Pressed to its logical ultimates, the Act, in the Commission's reading, would permit a carrier which had received freight from another to exercise the same right by tendering the same freight immediately back to the original carrier. Such examples, while remote, are not too extravagent to cast doubt on the validity of the Commission's construction of the Act.

An additional anomaly lies in the fact that the Commission's own Rules would appear to offend against its interpretation of Section 2. While motor carriers could demand TOFC service at the open-tariff rates offered to regular shippers, they would still be authorized to enter into agreements with rail carriers for joint intermodal service under Commission Rule 4, at rates fixed by private negotiation and contract. The choice would seem to be inconsistent with the Commission's own justifying principle as declared in its Rule 2, that TOFC service should "be made available to any person at a charge no greater and no less than that received from any other person. . . ." The effort to achieve equality rather produces a new inequality, since at least under the present practices carriers and shippers are separately served, each group at its own price. How far the Rules fall short of the announced objective of equal charges for all TOFC service is emphasized by the Commission's rejection of two proposed rules which would have fixed the open-tariff rate as the maximum rate which the railroad might receive through private agreements for joint intermodal service,

and which would have required the railroads to treat all motor carriers equally, as to services and rates, in its agreements for such joint intermodal service.[12] If the Commission were correct in its view that carriers and regular shippers are equally "persons" within the meaning of Section 2 of the Act, then that statutory prohibition against a railroad's receiving "from any person or persons a greater or less compensation for any service rendered" than from another, "by any special rate . . . or other device," would seem to require not only that carriers be treated as well as shippers, but that shippers be treated as well as carriers, and each carrier as well as any other.

In still another aspect, the Commission's Rules countenance an apparent discrimination which may be difficult to reconcile with the interpretation of Sections 2 and 3 of the Act as fully applicable to motor carriers shipping their customers' goods by rail. By its Rule 3, the Commission permits motor common carriers to utilize open-tariff TOFC service only between points on their authorized routes, and to tender traffic to railroads, or receive it from them, only at points which the motor carriers are authorized to serve. Under Rule 5, motor common carriers are subjected to still another limitation, prohibiting the use of open-tariff TOFC as a means to serve by direct route points which the motor carrier is authorized to serve only indirectly and circuitously, by combining route authorizations for other points. Since ordinary shippers are subject to none of these limits, the Rules do not achieve that equality of service which the Commission would require from its reading of Section 2. The answer, of course, lies in the fact that a motor carrier which makes use of open-tariff TOFC service is not merely an

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[12] The proposed rules, distributed in the initial stages of the proceeding, are set forth, and rejected, at 322 I.C.C. 328.

ordinary shipper, but is still a carrier subject to all limits imposed by law on its authority. The Commission itself thus recognizes that carriers and shippers are not equally and indiscriminately "persons" entitled to the same service at the same rates under Sections 2 and 3 of the Act.

IV.

While we have concluded that the Rules in question are not authorized in their affirmative commands by Sections 2 and 3 of the Interstate Commerce Act, properly interpreted, there is a related but independent ground under which these Rules must fall. Even if the Act specifically commanded the railroads to serve motor carriers and ordinary shippers without discrimination, there would remain the question whether the motor carriers could lawfully avail themselves of that service without violating their contracts with customers or exceeding the rights conferred by the certificate of public convenience and necessity which authorizes their operations. In other words, we are bound to consider the statutes regulating the operations of motor carriers as well as those imposing obligations upon the railroads.

The internal structure of the Interstate Commerce Act itself bears evidence of the limited authority conferred on the carrier. Each mode of transportation is the subject of a separate formal part of the act: part I deals with rail carriers; part II with carriers by motor vehicle; part III with carriers by water; and part IV with freight forwarders. The certificate of public convenience and necessity or license appropriate for each mode of transportation is, by its terms and by the internal logic of the legislation, confined to transportation by that mode. Thus the certificate issued to a motor carrier constitutes a formal determination of the public need for motor transportation, regardless of the availability of other modes,

and authorizes the holder to engage in for-hire transportation by "motor vehicle", not by rail or other modes, and on the "public highway".[13]

When operation by another mode is permissible, specific legislative exceptions have been created. Thus freight forwarders under part IV are specifically authorized to ship goods by means of common carriers governed by other parts of the Act.[14] Such special exceptions mirror the underlying statutory scheme that limits the carrier in each mode to transportation within and by that mode, absent special exception.

These elementary observations make plain the legislative plan that motor carriers shall perform their authorized services by motor vehicle unless shipment by other modes is permitted by some specific statutory exception. The only relevant statute which allows such substitution is Section 216(c) of the Act.[15] It provides:

> "(c) Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water. . . . In case of such joint rates, fares, or charges, it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers. . . ."

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[13] Secs. 203(a)(1) and (c), 206(a)(1), 209(a)(1); 49 U.S.C. §§ 303(a) and (c), 306(a)(1), 309(a)(1).

[14] Sec. 418; 49 U.S.C. § 1018.

[15] 49 U.S.C. § 316(c) (1935).

It is agreed on all sides that this provision is permissive. In declaring that carriers "*may* establish" through routes and joint rates, Congress left the matter to voluntary agreement, and did not empower the Commission to require such cooperation or coordination. This literal interpretation of Section 216(c) is reinforced by comparison with other provisions of the Act which, as between other classes of carriers, authorize compulsory through routes by Commission order.[16]

In the proceedings before the Commission and in this court, these plaintiffs submitted that to require the railroads to offer TOFC service equally to motor carriers would constitute the compulsory establishment of through routes in violation of the section. The Commission did not dispute the two premises of the argument: first, that the Commission is "without statutory power indirectly to require the establishment of through motor or motor-rail routes,"[17] and second, that requiring railroads to offer open-tariff TOFC service to motor carriers would amount to establishing compulsory *de facto* through routes. The Commission avoided the argument, however, by concluding that no compulsion was involved in its Rules. The Report states:

> "However, to say that we would be requiring the establishment of through routes merely by finding that it is lawful for a motor carrier to use the open-tariff TOFC rate of a rail carrier overlooks the fact that such a finding would involve no compulsion whatever—either on rail carriers to hold out a TOFC service or, if they do, on motor carriers to use it. We find this argument to be without merit."[18]

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[16] See Secs. 15(3), 1(4), Interstate Commerce Act, 49 U.S.C. §§ 15(3), 1(4); United States v. Pennsylvania R. Co., 323 U. S. 612 (1945).

[17] 322 I.C.C. 301, at 334.

[18] 322 I.C.C. 301, 335.

The Commission's position is at odds with reality. To say that the railroads are subject to no compulsion so long as they can avoid such through routes by abandoning all TOFC service for anyone hardly preserves the free choice intended by the congressional direction that such carriers "may establish" through routes. If the absence of compulsion is measured by the availability of alternatives, here compulsion is absolute. Under Section 1(4) of the Act, the railroad is bound "to provide and furnish transportation upon reasonable request therefor . . ."[19]

With equipment available for TOFC service, the railroad is thus compelled by law to provide such service to the general shipping public, and would then be compelled, under the Commission's Rule, to provide equal service to motor carriers, with no alternative at all.

With the Commission's ground untenable, counsel for the government and the Commission have resorted in this court to new grounds for avoiding the application of Section 216(c) and its implicit prohibition of compulsory through routes. This new position asserts that a through route exists by definition only when two carriers join in holding out the joint service. Since under the Commission's Rule the railroad would not join in holding out such service—and indeed would participate only by compulsion—it is said that no through route is involved. By verbal legerdemain, the rule against compulsory through routes thus would be read out of existence, since the logic of the argument carries the conclusion that whenever there is compulsion there is no through route.

The want of reason in the position is exemplified by the Commission's holding that TOFC service as now provided under Plan I is authorized as a through route arrangement under Section 216(c). The operative features

[19] 49 U.S.C. § 1(4) (1887).

of that Plan are identical with the TOFC service contemplated by the Commission's newly promulgated Rule 3. In each case the motor carrier has the option, subject to the shipper's veto, to employ substituted rail service or to haul the trailers over the highway. The shipper pays the motor carrier's rates upon motor carrier bills, and the motor carrier is subject to limits on circuity and points of service. The only difference between the two schemes is the railroad's consent under existing Plan I. If that Plan is to be sustained as a voluntary through route under Section 216(c),[20] then the Commission's new open-tariff TOFC service must be viewed as involving a compulsory through route forbidden by the section.[21]

Moreover, the argument does not avoid the fundamental limit derived from the statutory scheme, prohibiting the carrier from performing its transportation services through a mode not within its authorization, absent special ex-

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[20] None of the parties has challenged the validity of Plan I in the proceedings before this court. The legality of the Plan is under attack, however, in a separate suit pending in the District Court for the Northern District of Texas, Civil Action No. 4-355.

[21] Carriers by water, otherwise governed by the same principles as motor carriers, must be differentiated on the matter of through routes. By virtue of Section 15(3) of the Act, 49 U.S.C. § 15(3), "the Commission *may*, and it shall whenever deemed by it to be necessary or desirable in the public interest, *after full hearing* upon complaint or upon its own initiative without complaint, *establish through routes* . . . applicable to the transportation of passengers or property *by carriers by railroad* subject to this chapter and *common carriers by water* subject to chapter 12 of this title . . ." The Commision's Report and Order make no reference to this section as authority for the Rules promulgated, and its proceedings did not in any sense constitute the "full hearing" on the necessity for through rail-water routes which is required by that section. Since the section is the exclusive method by which the Commission may require joint rail-water service, and since its powers were not exercised or its requirements met, the Rules are no more valid as applied to TOFC services due water carriers than to motor carriers.

ception. Since the through route permitted by Section 216(c) is the exclusive statutory authority for the use of rail transportation by motor carriers, the Commission's Rule must qualify, if it is valid at all, as establishing through routes under that section.

V.

Still another obstacle to the Commission's Rules is posed by the separate complaint of the freight forwarders. They assert that the Commission's new Rules are invalid in so far as they would permit motor carriers to "utilize TOFC service in the performance of all or any portion of their authorized service . . . ."[22] The motor carrier would thereby be permitted to confine its own service to the assembly and consolidation of the shipment, leaving the actual transportation to the railroad, and would be acting not as a carrier but as a freight forwarder. The Rules thus run counter to the provisions of part IV of the Act which forbid any person to act as a freight forwarder without a permit issued by the Commission, and which prohibit the issuance of such permit to a common carrier.[23] In response, the Commission appears to have concluded that so long as the motor carrier holds the requisite authority, so that it *could* act as a carrier by transporting the shipment itself, it is acting in its capacity "as a carrier" even though no carrier service is performed in fact.[24] The non-carrying carrier thus would not be subject to the statute prohibiting any person from performing the services of a freight forwarder without a license, but would be excused by the provision exempting a person who performs such services "as a carrier."[25]

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[22] Rule 500.3(a), 322 I.C.C. 413.

[23] Sections 410(a)(1), (c), 49 U.S.C. 1010(a)(1), 1010(c).

[24] 322 I.C.C. 333, 335.

[25] Section 402(a)(5), 49 U.S.C. § 1002(a)(5).

No reason is suggested why we should suppose that Congress meant to allow a motor carrier to perform only the services of a freight forwarder, not as an incident to furnishing transportation, merely because the carrier holds a bare unexercised authority to furnish transportation, while at the same time Congress prohibited the licensing of motor carriers as freight forwarders.

The principal foundation for the Commission's new Rules is apparently summed up in its observation "We can see no justification either from the standpoint of legislative limitations or of policy considerations, for holding that one carrier may in no circumstances make use of the services which another carrier holds out to the public generally."[26] The observation can be sustained only if the motor carrier is permitted, chameleon-like, to change its coloration to evade these statutory prohibitions. Thus, to escape the Congressional denial of power to establish compulsory through routes under Sec. 216(c), it is claimed that the motor carrier in using the railroad's open-tariff TOFC service is acting not as a connecting carrier, but merely as a private person belonging to the general shipping public. At the same time, to escape the freight forwarder's claim, it is said that the motor carrier does the same thing not as an ordinary member of the general shipping public but as a carrier. To keep faith with Congress, to give reasonable effect to its commands, we are obliged to eschew word-play and to read the statutes in the light and spirit of their purpose. The policy explicit in Sections 216(c) and 402(a)(5), and implicit in the structure of the Interstate Commerce Act as a whole, does not allow a motor carrier to perform its authorized service simply by tendering the shipment to the railroad for transportation without the railroad's concurrence. This policy is reflected in the National Transportation Policy declared by Congress "to

[26] 322 I.C.C., at 335.

provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each. . . .'"[27] This underlying purpose militates against allowing rail carriers to invade the motor carrier field,[28] and its reason extends equally to the converse situation, where motor carriers seek to exploit the inherent advantages of rail transportation.

VI

We have thus far approached the issues of statutory interpretation as a matter of first impression. Our conclusion that the Commission's Rules exceed its powers under the Interstate Commerce Act does not rest alone, however, upon our construction of that legislation. The holding is supported and confirmed by the consistent and repeated decisions of the Commission and the courts. Few of these opinions can be regarded as directly holding that motor carriers cannot legally avail themselves of the railroads' open-tariff TOFC service without railroad concurrence. Nonetheless, they proceed upon premises which re-affirm the statutory principles previously considered.

The Commission's course of decision began before the enactment of part II of the Act, and before motor carriers were subjected to federal regulation. In *Trucks on Flatcars Between Chicago and Twin Cities*, 216 I.C.C. 435 (1936), the railroad had offered open-tariff service to motor carriers before the passage of part II; in a decision handed down after the regulatory act had taken effect, the Commission sanctioned the offering. It should be noted,

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[27] Act Sept. 18, 1940, 54 Stat. 899, 49 U.S.C. preceding § 1.

[28] American Trucking Associations, Inc. v. United States, 364 U. S. 1, 6 (1959); United States v. Rock Island Motor Transit Co., 340 U. S. 419, 431-2 (1951).

however, that the railroad had voluntarily offered the service to attract the traffic of a motor carrier, and that some five months later the railroad withdrew its open-tariff offering and entered into a through-route, joint rate arrangement with the motor carrier, approved in *Motor-Rail-Motor Traffic in East and Midwest*, 219 I.C.C. 245.

Whatever implications of approval might be drawn from the earlier decision were overruled three years later in *Substituted Freight Service*, 232 I.C.C. 683 (1939). Here the Commission plainly held that a motor carrier could not lawfully substitute rail service for its authorized highway service for a part of the line haul. Although the decision emphasizes the necessity for publication of tariffs disclosing the manner of carriage, it also requires that such tariffs be published with the concurrence of the railroad. In the absence of such concurrence, which would establish a through route at joint rates under Sec. 216(c),[29] the opinion declares that it is "repugnant to the act" for a motor carrier "to act as a common carrier by motor vehicle and as a shipper by rail as to the same service. . . ."[30] This interpretation of the Act was followed and affirmed in an unbroken line of decisions of the Commission in the intervening years. Such cases as *Ringsby Truck Lines, Inc.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 263 I.C.C. 139, 141 (1945); *Savage Application*, 265 I.C.C. 157, 167 (1947); and *Movement of Highway Trailers by Rail* (the so-called New Haven case), 293 I.C.C. 93 (1954), are illustrative. For twenty-five years, until the decision here under review, the Commission had adhered to this interpretation of the act directly in conflict with its newly announced views.

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[29] 49 U.S.C. § 316(c).

[30] 232 I.C.C., 690.

In the courts, a similar principle is established in holdings to the effect that a person who engages in transporting goods for the general public by using open-tariff service of common carriers is not himself engaged as a common carrier by motor vehicle, so as to be entitled to a certificate of public convenience and necessity under the "grandfather" provisions of the Act. *Acme Fast Freight, Inc.* v. *United States,* 30 F. Supp. 968 (D.C.N.Y. 1940), aff'd p. c. 309 U. S. 638; *Ready Truck Lines, Inc.* v. *United States,* 42 F. Supp. 970 (N. D. Ill. 1941), affirmed 314 U. S. 580. The relevant premise of the decisions is that the authorized service of the common carrier by motor vehicle under the law is transportation over the public highways by motor vehicle, not rail transportation by railroad. The cases would be distinguishable only if we were willing to rule that the unexercised power to provide highway service qualifies a person as a motor carrier even though he provides transportation solely by rail instead.

In the *Acme* case, it was also urged that a joint service arrangement might be valid outside the limits of Section 216(c) of the Act, 49 U.S.C. § 316(c), a contention similar to that presented by counsel for the government here. The court concluded as we have, that the provisions of that section are the exclusive means for establishing joint motor-rail through routes and joint rates, and that any such arrangement not in conformity with the section must fall.[21] Implicit in that section is the Commission's lack of power to compel motor carriers and rail carriers to provide coordinated service, and it was this lack of power which justified permitting railroads to provide motor carrier service incidental and supplemental to their rail transportation. *Interstate Commerce Commission* v. *Parker,* 326 U. S. 60, 72 (1945). See Fulda, *Rail-Motor Competi-*

[21] 30 F. Supp. at 973.

tion: Motor Carrier Operations by Railroads, 54 Nw. L. Rev. 156, 201 (1959).

Although it is settled that a common carrier may not discriminate against (or in favor of) another carrier shipping its own property for its own purposes,[32] Sections 2 and 3 of the Act have never, so far as appears, been interpreted by the Commission or the courts to require one carrier to perform service as a substitute for another carrier, *qua* carrier, as the Commission's new rules would command. In the face of this settled interpretation of the Act by the Commission itself as well as the courts, the deference ordinarily due to the construction of the Act by the administrative agency responsible for its enforcement is not called for. See *All States Freight, Inc* v. *New York, New Haven & Hartford Railroad*, 379 U. S. 343 (1964); *Atchison, Topeka and Santa Fe Railway Co.* v. *United States*, 209 F. Supp. 35, 41-42 (N. D. Ill. 1962); *United States* v. *Leslie Salt Co.*, 350 U. S. 383, 396 (1956).

Moreover, this settled interpretation of the Act has been recognized and accepted by both the executive and legislative branches. In his Message to Congress Relative to the Transportation System on April 5, 1962, the President recommended legislative action to achieve precisely the result of the Commission's Rules here in issue.[33] Bills to effectuate this proposal were introduced both in the Senate and in the House in 1962 and again in 1963.[34] Pending at

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[32] I.C.C. v. Baltimore & Ohio R.R., 225 U. S. 326 (1912). Freight forwarders, not entitled to establish through routes and joint rates with common carriers under the Act, are in the same position as ordinary shippers and are thus protected from discrimination under the Act. I.C.C. v. Delaware, L. & W. R.R., 220 U. S. 235 (1911).

[33] H.R. Doc. No. 384, 87th Cong., 2d Sess.

[34] S. 3242 and H.R. 11584, 87th Cong., 2d Sess. (1962) and S. 1062 and H.R. 4701, 88th Cong., 1st Sess. (1963). It should be noted that each bill would have amended Section 2 of the Act not to prohibit discrimination against competing carriers generally and as to all service, as the Commission's reading would require, but merely to prohibit discrimination in the transportation of "loaded or empty vehicles or shipping containers," that is, TOFC service.

the same time were bills proposed by the Commission itself to achieve a similar objective by amending Section 216(c) of the Act to empower the Commission to compel motor carriers and railroads to establish through routes.[35] Congress failed to enact any of these proposals. While courts must take care not to give undue weight to legislative inaction, the fact that the President placed before the Congress a proposal predicated upon a specific interpretation of existing law cannot wholly be ignored in interpreting that law when Congress has refused to make the suggested change. See *Blau* v. *Lehman*, 368 U. S. 403, 412-13 (1962); *Maurer* v. *Hamilton*, 309 U. S. 598, 613 (1940).

In conclusion, it appears that neither the specific provisions of the Interstate Commerce Act nor its general underlying scheme confer authority upon the Commission to compel railroads to provide open-tariff TOFC service to motor carriers; on the contrary, the Act both in its specifics and general policy, forbid such compulsion. With the confirmation of this interpretation in an unbroken line of Commission decisions, in judicial precedent, and in executive and legislative understanding, there is no room for the Commission to alter the settled meaning. Like the Commission, this court is foreclosed from indulgence in the broad formulation of wise transportation policy. Those considerations belong to the Congress. We therefore hold that Rules 2 and 3 as promulgated by the Commission in this proceeding, and Rule 5 in so far as it amplifies those rules, are invalid and must be set aside.

VII

Two collateral matters remain for disposition. While the plaintiffs asserted principally the invalidity of Rules 2 and 3, they have also attacked Rules 5 and 7 promulgated by the Commission in the same proceeding and order.

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[35] S. 3510 and H.R. 12362, 87th Cong., 2d Sess. (1962); S. 676 and H.R. 2088, 88th Cong., 1st Sess. (1963).

Rule 5 represents the Commission's effort to assure that TOFC service will not be misused by motor carriers as a means of circumventing the limits of their certificates concerning authorized routes. Since a motor carrier might be able to link its separately authorized routes to create a circuitous route between authorized points of service, and to achieve the benefits of a direct route authorization by utilizing TOFC service directly between those points, Rule 5 permits motor carriers to use TOFC service "in lieu of their authorized line haul transportation" only if the rail distance is at least 85 per cent of the highway distance by the authorized route.[38] In so far as this Rule relates to open-tariff TOFC service, it falls, *pro tanto,* with Rules 2 and 3. The railroads have attacked its remaining application to joint intermodal service as ambiguous and arbitrary, to the extent that it may control joint intermodal service under existing plan V. We cannot agree that the Rule is without rational foundation. To the extent that through routes are established end to end under plan V, the Rule by its terms has no application. Where the TOFC service is used "in lieu of" the motor carrier's line haul transportation between points the motor carrier could serve, we cannot conclude that the Commission was fatally arbitrary in concluding that respect for the limits of the

[38] The Rule provides in relevant part:

500.5 *Circuity limitations.*—

(*a*) Motor and water common carriers shall not participate in joint intermodal TOFC service which is to be provided in lieu of their authorized line-haul transportation, and motor and water common and contract carriers shall not utilize open-tariff TOFC service, where the distance from origin to destination over the route including the TOFC movement is less than 85 per cent of the distance between such points over the motor or water carrier's authorized service route; *provided, however,* that the Interstate Commerce Commission may grant relief from the provisions of this paragraph upon consideration of an appropriate petition.

certificates issued requires the imposition of circuity safeguards, whether the intermodal arrangement for the substitution of TOFC service would be classed as plan I or plan V.

Finally, the plaintiffs have attacked the validity of Rule 7, claiming it to be arbitrary, ambiguous, and beyond the Commission's power. In substance, the Rule requires publication in tariff form of the rates and rules governing the leasing of equipment (practically, highway trailers) by a railroad or its affiliate to any person using the railroad's TOFC service. Literally, the Rule does not require that the lease be *for the purpose* of TOFC shipment, but only to a "person using" the railroad's TOFC service. It is plain from the objectives of the Commission as elaborated in its Report, however, that the Commission was concerned with the leasing of trailers by the railroad for use in its own TOFC service, as part of the total transportation service supplied. This limited interpretation of the Rule was specifically avowed by counsel for the government on brief and in oral argument. In this reading, the Rule would find support in Section 6(1) of the Act, requiring full publication of all charges and privileges or facilities affecting the value of the service rendered to the shipper, and by Section 1(3)(a), defining rail "transportation" to include the instrumentalities of carriage, irrespective of ownership.

Since the proceeding must be remanded to the Commission in any event, for a general revision of the Rules as a whole in conformity with these views, we will adopt and accept this limited interpretation of Rule 7. The Commission will have an early opportunity to clarify its intent if a broader scope should be thought necessary. Limited in this way, the Rule appears to be subject to no invalidating objection.

A decree will be entered for the plaintiffs, consistent with the foregoing conclusions.

Appendix A.

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

Civil Action No. 64 C 1442

The Atchison, Topeka and Santa Fe Railway Company; Chicago & Eastern Illinois Railroad Company; Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Chicago, Rock Island and Pacific Railroad Company; The Denver and Rio Grande Western Railroad Company; Great Northern Railway Company; The Kansas City Southern Railway Company; Louisiana & Arkansas Railway Company; Missouri-Kansas-Texas Railroad Company; Missouri Pacific Railroad Company; Northern Pacific Railway Company; St. Louis-San Francisco Railway Company; St. Louis Southwestern Railway Company; Soo Line Railroad Company; Southern Pacific Company; Union Pacific Railroad Company; Wabash Railroad Company; The Western Pacific Railroad Company;

Plaintiffs,

v.

United States of America; and Interstate Commerce Commission;

Defendants.

DECREE

This cause having come on for trial before the Court, consisting of three judges convened pursuant to law, and the Court having heard and considered the evidence and the briefs and arguments of counsel for the parties, and having rendered and filed its Opinion herein containing

its findings of fact and conclusions of law, and being fully advised in the premises, it is

ORDERED, ADJUDGED, AND DECREED:

1. That the Report and Order of the Interstate Commerce Commission entered in its proceeding numbered Ex Parte 230 and entitled *Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, dated March 16, 1964, in so far as it issues and prescribes Rules 2 and 3 contained therein and designated as 49 C.F.R. 500.2 and 500.3, be and hereby is set aside and annulled;

2. That the defendant Interstate Commerce Commission be and hereby is permanently enjoined and restrained from enforcing said Rules 2 and 3 contained in and issued by the Report and Order aforesaid; and

3. That this proceeding be and hereby is remanded to the Interstate Commerce Commission for such further proceedings, consistent with the Opinion and Decree of this Court, as may be appropriate.

Dated this 20th day of August, 1965.

ENTER:

/s/ LATHAM CASTLE
Circuit Judge

/s/ JULIUS J. HOFFMAN
District Judge

/s/ BERNARD M. DECKER
District Judge

APPENDIX B

Served Apr. 3, 1964

30144

INTERSTATE COMMERCE COMMISSION

EX PARTE No. 230

SUBSTITUTED SERVICE—CHARGES AND PRACTICES OF FOR-HIRE CARRIERS AND FREIGHT FORWARDERS

(PIGGYBACK SERVICE)

Decided March 16, 1964

Upon notice of proposed rulemaking, rules and regulations governing the practices of for-hire carriers of property, operating in interstate or foreign commerce and providing or participating in trailer-on-flatcar service, prescribed.

A table of contents to this report is contained in appendix V.

Harry C. Ames, S. S. Eisen, James L. Givan, George H. Leonard, F. N. Melius, Jr., Giles Morrow, Theo. R. Schneider, Leonard Stelzer, D. Robert Thomas, and *Martin Whitten* for various freight forwarders and freight forwarder associations.

Peter T. Beardsley, Albert F. Beasley, James L. Beatty, Walter N. Bieneman, W. H. Borghesani, Jr., Ferdinand Born, Robert E. Born, R. Edwin Brady, Le Grand A. Carlston, Homer S. Carpenter, Eldon R. Clawson, James I. Collier, W. Wilson Corroum, Ray M. Cream, Paul M.

Daniell, Francis P. Desmond, George S. Dixon, Robert C. Dryden, J. F. Edell, Howell Ellis, Marion M. Emery, W. B. Ewers, John S. Fessenden, F. H. Floyd, F. G. Freund, Robert Gawley, Harry L. Grubbs, Marvin Handler, James E. Haydon, Richard A. Heilprin, Harold G. Hernly, Thomas J. Houser, Earl Hummer, Harry J. Jordan, S. Harrison Kahn, Joseph E. Keller, James K. Knudson, Houston Lynch, Jr., Carney D. Matheson, Herman Matthei, Francis W. McInerny, George D. Michalson, M. Bruce Morgan, Glenn F. Morgan, Arlus C. Morris, Lloyd Ownbey, Jr., Guy H. Postell, Bryce Rea, Jr., G. M. Rebman, Roland Rice, Floyd M. Roach, William R. Rubbert, Reagan Sayers, Richard R. Sigmon, Louis E. Smith, R. P. Sohan, Hugh M. Steinberger, Glenn W. Stephens, C. Austin Sutherland, Clarence D. Todd, Edward G. Villalon, William M. Watt, Harvey A. Welty, Gene F. West, James J. Williams, James E. Wilson, James W. Wrape, and *Chester A. Zyblut* for various motor carriers and motor carrier associations.

John W. Adams, Jr., Margaret P. Allen, Curtis H. Berg, Harry N. Babcock, John J. Burchell, James A. Bistline, R. G. Bleakney, Jr., Benson T. Buck, Charles W. Burkett, Jr., J. T. Clark, J. L. Connor, Richard E. Costello, Robert W. Cronon, John A. Daily, John C. Danielson, Robert S. Davis, William E. Davis, C. H. Dickman, Kemper A. Dobbins, John H. Doeringer, Robert H. Duesenberg, Paul R. Duke, J. H. Durkin, Urchie B. Ellis, J. D. Feeney, James A. Gillen, E. D. Grinnell, Jr., Rene J. Gunning, Carl P. Greeley, John W. Hanifin, L. W. Hobbs, Bryce Hamilton, Louis A. Harris, William P. Higgins, James W. Hoeland, Richard A. Hollander, Eugene E. Hunt, J. H. Jester, Edmund J. Kenivy, Jess Larson, Harry B. LaTourette, Roland J. Lehman, E. R. Leigh, George M. Mariner, C. E. Martin, Amos M. Mathews, John E. McCullough, W. D. McLean, Thormond A. Miller, William M. Moloney, P. G. Mullen, Robert F. Munsell, Walter J. Myskowski, James W. Nisbet, Eldon S. Olson, W. H. Parsons, C. Harold

Peterson, Earnest Porter, Gregory S. Prince, C. C. Rettberg, Jr., Wade M. Richards, Albert B. Russ, Jr., John F. Smith, John MacDonald Smith, Robert H. Stahlheber, William A. Thie, Robert A. Thompson, L. E. Torinus, Walter G. Treanor, Ray M. Van Hook, Harold Vikoren, Archie T. Walters, Philip F. Welsh, Edward K. Wheeler, Robert J. Williams, D. N. Zirkle, and *Erle J. Zoll, Jr.,* for various railroads and railroad associations.

Paul J. Coughlin, John Mason, Andrew A. Normandeau, and *Hugh H. Shull, Jr,.* for water carriers.

Theo. F. Behler, Harry Bradt, John M. Cleary, Ronald N. Cobert, Paul Coyle, John F. Donelan, Lester J. Door, Samuel W. Earnshaw, Donald W. Fisher, Walter R. Frizzell, Benjamin G. Habberton, Dan F. Hart, John B. Hedges, Leonard A. Jaskiewicz, Jess Larson, John C. Lincoln, Dickson R. Loos, Sumner J. McCollester, Clarence M. Mulholland, Clarke Munn, Jr., A. E. Norrbom, James E. O'Boyle, E. S. Partridge, Warren Price, Jr., Frederick M. Porter, Philip H. Porter, Aloysius F. Power, Theo. R. Schneider, William R. Settgas, Louis R. Simpson, Charles W. Singer, Harold E. Spencer, James E. Steffarud, Warren H. Wagner, Charles A. Washer, M. W. Wells, John C. White, and *Sidney Zagri* for shippers or other interested parties.

John M. Agrey for Public Service Commission of North Dakota.

Harold C. Heublein for Public Service Commission of Wisconsin.

Charles W. Bucy, Carl R. Bullock, Joseph E. Quin, George A. Robertson, and *Clarence H. Williams* for Department of Agriculture.

John E. Faulk, R. M. Hartsock, and *Clement T. Mayo* for Department of Defense.

William R. Pierce for General Services Administration.

John H. Fallon, Harvey Gobetz, and *Asa J. Merrill* for Bureau of Inquiry and Compliance, Interstate Commerce Commission.

Appendix B.

REPORT OF THE COMMISSION ON ORAL ARGUMENT

BY THE COMMISSION:

This proceeding, instituted on June 29, 1962, on our own motion under the authority of parts I, II, III, and IV of the Interstate Commerce Act and section 4 of the Administrative Procedure Act, constitutes this Commission's first general investigation of what is probably the most significant recent development in transportation—trailer-on-flatcar or piggyback service. The notice of proposed rulemaking made it known that we intended this investigation to be broad in scope, encompassing every aspect of TOFC operations, and that we intended to explore new approaches to piggyback service. Among the matters specifically mentioned in the notice as a subject for consideration was:

> The extent to which motor carriers, water carriers, express companies and freight forwarders should be permitted to use Plans III and IV [open-tariff] rail rates and service in their operations.

It was also made clear that we intended to reexamine existing precedents and practices, and that consideration would be given to the adoption of rules and regulations which might be found necessary to regulate coordinated and substituted service transportation in the public interest.

The order instituting this proceeding named as respondents all railroads, motor carriers, and water carriers of property, freight forwarders, and express companies operating in interstate commerce, and authorized and directed our Bureau of Inquiry and Compliance to participate. It also assigned the matter for a prehearing conference, which was held October 9, 1962, and at which proposed rules, reproduced as appendix II hereto, were distributed. Oral hearings have not been held, but representations, verified statements, and reply statements have been received from

numerous interested parties. The proceeding was assigned to two hearing examiners who recommended adoption of the regulations contained in appendix III hereto. Exceptions to the examiners' recommended order and replies thereto have been filed by the parties listed in appendix I, and we have heard oral argument. Two issues, the practices of for-hire motor carriers of automobiles and the practices of for-hire water carriers providing "fishyback" service, were severed from the remainder of the proceeding by order of November 12, 1963, for oral hearing and separate handling.

The southern railroads have included in their exceptions motions to strike certain portions of the verified statements filed by the Bureau of Inquiry and Compliance and certain other parties. They argue that the Bureau has overstepped its authorization, contained in the order instituting this proceeding, to participate in this proceeding "for the purpose of developing the evidence and the issues," and that the other matter objected to is irrelevant or incompetent as evidence. Also pending is a motion filed by the same carriers on April 2, 1963, for cross-examination of the Director of the Bureau of Inquiry and Compliance. The southern railroads have obviously misunderstood the position of the Bureau in this proceeding. It is a party like any other, and it was free to introduce any evidence it saw fit. The Director of the Bureau did not sponsor a verified statement, and has appeared in this proceeding only as counsel. There is no more reason to subject him to cross-examination than any other attorney appearing in a solely representative capacity. The other verified statements objected to should, in our opinion, remain in the record. The motions will be denied.

Trailer-on-Flatcar Operations

If the subsequent discussion is to be understandable, a word must be said at the outset about the nomenclature

of TOFC services. The varieties of services available are commonly referred to in terms of five numbered plans. These designations have attained general use in the transportation industry, and for the sake of convenience we are using them in this report. They will be discussed in greater detail later, but the following capsule definitions were contained in the appendix to the order instituting this proceeding:

PLAN I

Railroad movement of trailers or containers of motor common carriers, with the shipment moving on one bill of lading and billing be done by the trucker. Traffic moves under rates in regular motor carrier tariffs.

PLAN II

Railroad performs its own door-to-door service, moving its own trailers or containers on flatcars under tariffs usually similar to those of truckers.

PLAN III

Ramp-to-ramp rates based on a flat charge, regardless of the contents of trailers or containers, usually owned or leased by freight forwarders or shippers. No pickup or delivery is performed by the railroad.

PLAN IV

Shipper or forwarder furnishes a trailer or container-loaded flatcar, either owned or leased. The railroad makes a flat charge for loaded or empty-car movement, furnishing only power and rails.

PLAN V

Traffic moves generally under joint railroad-truck or other combination of coordinated service rates. Either mode may solicit traffic for through movement.

The development and effect of TOFC service.—Transportation of loaded highway trailers on railroad flatcars

is not a new development, although its growth has been explosive in the past 5 years. Nearly 40 years ago the Chicago, North Shore and Milwaukee Railroad Company pioneered a "ferry truck" service that was essentially similar to today's plan II piggybacking by the railroads. Pressed by increasing independent motor carrier competition, the North Shore in May 1926 inaugurated a new service for merchandise traffic between Chicago and Milwaukee: using carrier-owned 16-foot trailers and specially constructed flatcars, it would provide a door-to-door delivery of less-than-carload freight in trailer units requiring no transfer of lading en route from shipper to consignee. This was a complete railroad service at rail rates on rail bills of lading. At the outset this service was performed at the same rates and charges previously applicable to the various classes of merchandise transported, but in February 1928 this rate structure was modified and a flat all-merchandise rate, subject to a minimum weight and excepting livestock and perishables, was published.

The prototypes of today's plan I and plan III TOFC service were developed on an experimental basis by several other railroads in the early 1930's. In these years the railroads were competing with aggressive, rapidly expanding, if unorganized, independent motortruck operators who were not subject to route or rate regulation and who were able to provide extremely flexible pickup, delivery, and accessorial services. TOFC service at this early date was designed to induce trucking companies to ship their vehicles by rail instead of operating them over the highways. Private shippers were free to use this service, but there is no indication that they did so in any substantial volume at this stage of TOFC development. The rail rates that were charged for this service reflected substantially the average direct line-haul expense of operating a truck over the shortest available highway routes between the points served.

Appendix B.

By tariff schedules filed to become effective in March 1936, the Chicago Great Western Railway Company offered to transport highway trailers between Chicago and St. Paul at a flat charge of $42.50 per loaded trailer, with a maximum lading of 20,000 pounds per trailer and a minimum charge of $85 if fewer than two trailers were tendered for shipment in a single day. This was an "open-tariff service" intended to attract traffic from all highway carriers, including for-hire motor carriers as well as private shippers operating their own trucks, and from freight forwarders. This service was substantially different from existing less-than-carload transportation because it did not include pickup, delivery, loading, or unloading, and it was essentially a ramp-to-ramp operation. When part II of the Interstate Commerce Act became effective in 1935, thus making for-hire interstate motor carrier operations subject to route and rate regulation, new tariff arrangements were proposed to provide for joint rates between the Great Western and the participating motor common carriers. The new schedules named motor-rail-motor rates between certain authorized "grandfather" service points of the motor carriers which were located beyond the Chicago and St. Paul ramp points. The railroad would act only as an intermediate or "bridge" carrier; the motor carrier would originate and deliver the traffic. The railroad would receive as its division of revenue substantially the same per-trailer amount previously published in the open tariff. These joint rates were allowed to become effective.

The New York, New Haven and Hartford Railroad Company instituted TOFC operations in 1937, offering an open-tariff service to private shippers and motor contract carriers, and a "substituted service" to motor common carriers. These TOFC services were used almost exclusively by motor common carriers under the latter arrange-

ment, which was essentially the same as present-day plan I service. In 1953 approximately 50,000 trailers were transported by the New Haven in this type of service.

The experience, however, of most railroads in TOFC operations was very limited until 1954, the year in which this Commission gave approval to a number of practices that were then slowly developing. See *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, the so-called *New Haven* case. Almost immediately a number of railroads inaugurated or expanded their plan I and plan II TOFC operations. The Pennsylvania Railroad Company, for example, began its plan II type of service in 1954 and it handled approximately 15,000 trailers in plan II during the last 6 months of that year. Its estimated total for plan II in 1962 was 55,000 trailers. In 1955, the Pennsylvania transported about 17,000 trailers in plan I service, and that amount has grown to an estimated 80,000 trailers in 1962. Its first full year of plan III was 1959 when 10,500 trailers were handled. By 1961 that total had grown to 43,000 trailers, and its estimate for 1962 was 65,000 trailers.

The Louisville and Nashville Railroad Company started its plan II service in 1955, and handled 193 trailers for total revenue of $33,790. In 1962 these totals for plan II operations had increased to 6,712 trailers and $1.3 million in revenue. In 1960 it handled 46 trailers in plan I service for a revenue of $3,468. In 1961 these totals for plan I had increased to 1,771 trailers and $150,388 in revenue. Plan III was inaugurated in 1960 when 181 trailers were moved for $24,271 revenue. In 2 years its plan III totals increased to 8,618 trailers and approximately $1 million revenue.

There can be little doubt that piggybacking has been a decisive factor in returning to the railroads a substantial volume of traffic that previously had been moving by other modes of transportation, private and for-hire. The growth

of plan I has meant a direct growth in railroad participation in motor common carrier highway traffic. For example, Consolidated Freightways, a motor common carrier, has plan I arrangements with 23 railroads providing for service between 340 pairs of points. During 1961 it paid approximately $1 million to these railroads for their plan I TOFC services. In the first 10 months of 1962, Consolidated Freightways moved 7,878 trailers in plan I operations, and paid more than $1.8 million to the railroads for their piggyback services, nearly doubling the 1961 payment.

The growth of plan III and plan IV TOFC service has also meant diversion of highway traffic both from the for-hire motor carrier industry and from individual companies either engaging in private carriage or planning to do so. The Eastman Kodak Company markets a large volume of miscellaneous chemicals as packaged freight from Rochester, N. Y., through seven sales divisions throughout the country. It began use of plan III from Rochester to its midwestern division at Chicago in 1959; to its South Dakota division and to Chamblee, Ga., in 1960; and then as a return movement from a Midland, Mich., supply point to Rochester in 1960. During 1961 its traffic between these cities totaled 24.5 million pounds in plan III, and its 1962 tonnage was expected to reach 40 million pounds. Before its use of plan III, all of this traffic was shipped by motor common carrier. Its Chicago plant, for example, which accounts for the largest share, is an off-track facility. Rail service to this branch house previously was impractical because it involved local cartage and transfer of lading, but plan III rail service has turned out to be practical and efficient.

A few years ago the Monsanto Chemical Company had completed an exhaustive survey of private carriage for its St. Louis plants, and it was on the verge of going heavily into private motor carrier operations. Its projected motor

operating costs were expected to be 35 cents a trailer-mile. One eastern railroad offered its plan III service at 50 cents a flatcar-mile, or 25 cents per trailer-mile. Consequently Monsanto turned to plan III, and it has since been shipping approximately 50 million pounds of package freight annually in plan III from its three St. Louis plants to its eastern territory between Philadelphia and Boston. About 15 years ago all of this package freight went by rail. Starting at that time there was a gradual shift to motor carriage and ultimately motor common carriers handled essentially all the traffic. This trend was reversed decisively with Monsanto's use of plan III which now has become the primary method of movement of this traffic.

At the present time the available statistical data on TOFC operations and services throughout the Nation is not sufficiently refined or reliable to demonstrate authoritatively the precise extent to which railroad successes with piggybacking have meant actual diversions of traffic from competitive modes of transport. But the examples of Consolidated Freightways, Monsanto, and Eastman Kodak are typical of many others around the Nation, and the railroads generally are enthusiastically attempting to duplicate experiences like these. In 1957 a total of 57 class I railroads were participating in TOFC tariffs; in mid-1963 there were 100 class I roads doing so. In 1955, 32 railroads reported a total of 168,150 TOFC carloadings, for a weekly average of 3,234. In 1959, 50 reporting railroads showed totals of 415,156 annual and 7,984 weekly average carloadings for TOFC. For 1963, 63 reporting railroads indicated continued growth to approximately 797,500 loaded TOFC cars, a weekly rate of approximately 12,700 loadings.

It is apparent, however, that substantial investments have been made by the railroads and others in TOFC equipment. The New York Central has invested a total of almost $30 million, not including its investment in

Flexi-van[1] terminals. The Seaboard Air Line Railroad Company has invested $1,147,000 in 55 ramps; The Chesapeake and Ohio Railway Company shows $2,800,000 invested in TOFC equipment and ramps; The Atchison, Topeka and Santa Fe Railway Company shows $2.1 million invested in piggyback facilities at Chicago, Los Angeles, and Oakland; The Baltimore and Ohio Railroad Company shows $2.6 million invested in TOFC trailers and freight cars, $670,000 in ramps, and $186,559 in cranes; the Pacific Fruit Express Company has $6,579,600 invested in TOFC equipment and in addition its leased equipment represents an investment of $2.8 million. It has placed orders for 200 additional 40-foot refrigerated trailers at a cost of $2,470,000 making a total investment of approximately $12 million.

This record does not show how extensively commercial shippers have invested in TOFC equipment but the investment of freight forwarders is set forth. As of January 1, 1963, the freight forwarders, represented in this proceeding, had an investment amounting to $10.5 million in trailers, tractors, and freight cars. They also have annual obligations in long-term leases on freight cars and trailers amounting to $1.6 million.

The five piggyback plans.—Plan I TOFC service involves the movement by railroad of loaded trailers or similar containers of motor carriers, with the contents thereof moving on one bill of lading issued by the trucker. This substituted rail service is available only between points where there is actually available service by the motor carrier which substitutes rail for motor service. The traffic moves on rates which are the same as the trucker applies

[1] "Flexi-van" is a specialized type of TOFC equipment, developed primarily by the New York Central, and used by only a few railroads. Its principal characteristics are a trailer with a demountable body and a specially built, light-weight rail car which is designed to carry only Flexi-van trailers and which may be side-loaded without the use of the normal circus-type ramp.

on its all-highway service. The motor carriers solicit the traffic for movement in their own trailers, which, in the absence of the shipper's forbidding the use of substituted rail service, is tendered to the railroad for line-haul transportation. The trailer is brought to the railroad ramp by the motor carrier where it is placed onto the flatcar. The trailer is sealed and the railroad has no knowledge of the traffic being transported, except for the total weight of lading in each trailer. The railroad's compensation in such a move is based upon a division of the charges arrived at through negotiations between the two carriers. This division of charges is published as a division sheet but is not customarily made available to the shipping public nor is it filed with the Commission. At destination the trailers are unloaded from the flatcars and delivered over-the-road to destination by the motor carrier. So long as the motor common carrier meets the financial responsibility and route authority requirements, the participating railroads are generally willing to share plan I arrangements with any such motor carrier.

As previously noted, the *New Haven* case provided the framework of legal principles that has governed the renewed growth and interest in piggyback operations which began in 1953. There the Commission defined the relationships of motor carriers, railroads, and shippers involved in these trailer-on-flatcar services. For several years following the *New Haven* decision there were few controversies within the industry about the scope of plan I TOFC services permissible under the various operating authorities of the motor carriers. More recently, however, with the vastly accelerated utilization of TOFC services, the whole concept of plan I TOFC has anew been brought into question, both on the point of its essential legality under the controlling statutes and on the point of its economic desirability under regulation. At the same time there have arisen a number of related questions con-

cerning the authority of motor carriers to engage in plan I piggyback in specific circumstances, such as the following: whether motor carriers may interchange plan I piggyback traffic at the point of origin of the traffic, with the railroad performing the entire line-haul movement; whether a motor carrier needs specific operating authority to provide service *to* or *from* the ramp points at which it will interchange plan I traffic with the railroad performing the piggyback operation; whether the relative circuity of the authorized service route of a motor carrier should be considered as a factor in allowing that motor carrier to use railroad TOFC service between such points; and whether motor contract carriers may participate in plan I TOFC to the same extent as motor common carriers.

Under plan II, the railroad holds out to provide a complete door-to-door service under a single bill of lading. Neither the shipper nor the consignee intervenes in any way in the overall transportation activities or does anything beyond tendering the shipment to the railroad at origin or at the shipper's loading dock. The railroad assumes full responsibility in the following respects: providing the shipper with a trailer; moving the trailer to, and placing it at, the shipper's door for pickup; loading the freight into the trailer; moving the loaded trailer from the shipper's dock to the rail TOFC ramp, furnishing a tractor and driver; supplying the rail flatcar; placing and securing the trailer onto the flatcar; providing the line-haul transportation from origin ramp to destination ramp; unloading the trailer from the flatcar at destination; moving the loaded trailer from the destination ramp to consignee's store door, again furnishing a tractor and driver; unloading the freight from the trailer; and finally removing the empty trailer.

The published rate which includes all of the above-mentioned services to be performed by the railroad generally applies (*a*) to a specific commodity or a group of

specific commodities; (*b*) in straight or mixed carloads without mixture limitations; (*c*) in a single trailer; and (*d*) subject to a rate per 100 pounds and a minimum rate tailored to the specific commodity involved.

Under plan III, the railroad furnishes only a transportation service between its TOFC ramps. The only additional service the railroad performs in accordance with its tariff is placing and securing the trailers onto the flatcars at the origin ramp and the unloading of the trailers from the flatcars at the destination ramp. This service is offered to private shippers and freight forwarders. The shipper using plan III must assume the full responsibility for the following: supplying its own trailer either by ownership or through a lease arrangement; moving or arranging to move the trailer to the shipper's dock for loading the freight into the trailer; moving the loaded trailer from the shipper's dock to the railroad TOFC ramp, which means that the shipper must arrange for the furnishing of a tractor and driver; arranging for the issuance of an appropriate bill of lading from the railroad origin ramp to the railroad destination ramp; receiving the loaded trailer at the destination ramp; furnishing or arranging for the furnishing of the physical facilities for removing the trailer from the destination TOFC ramp to the consignee's store door; unloading the freight from the trailer; and finally returning the trailer, where leased, to the lessor.

Under plan III the published rate generally applies (*a*) to freight, all kinds; (*b*) in mixed carloads; (*c*) subject to specific mixing rules and regulations; (*d*) in two-trailer lots; and (*e*) further subject to a maximum load of 70,000 pounds at the flat charge per carload and irrespective of the mixture of freight involved.

Trip leasing of trailers from the railroads or their subsidiary leasing companies has become commonplace with many shippers and freight forwarders. At the present time the tariffs offering plan III service do not include,

in most instances, the leasing charges, a statement of the amount of free time allowed for loading or unloading, detention charges, or protective service charges.

Plan IV is comparable to plan III except that the shipper has the additional responsibility of furnishing the railroad flatcar, including the loading and unloading of the trailers onto and off the flatcar.

Plan V involves through motor-rail or motor-rail-motor services at joint rates applicable only over the through route or routes. Either mode may originate or deliver a plan V shipment, and the traffic will move on either a rail or motor bill of lading depending upon which carrier originates the shipment. In particular contrast to plan I operations, there need not be available to the shipper an alternative all-highway motor carrier service between the points where the plan V joint rate is applicable. Plan V coordination therefore is used either (1) where the rail and motor carriers serve different areas and are combining their services to perform a new service between origin and destination; or (2) where they are performing service over parallel routings and are in effect, at least, substituting one mode of transportation for the other for a portion of the line-haul.

Equipment leasing practices.—Many forms of leasing arrangements have burgeoned forth in the past few years as part of the accelerated growth of plans III and IV TOFC service. As seen, these plans contemplate use of trailers or flatcar-trailer combinations owned or provided by shippers, rather than the railroads. Although some shippers own such equipment, most do not; moreover, those who do find it difficult or impossible to balance their traffic so as to secure maximum economic use of equipment in TOFC service. Consequently, as TOFC service has grown there has arisen the practice of trip leasing trailers and flatcars by individual shippers wishing to take advantage of the available, minimal-service, ramp-to-ramp

rail rates, and of the fact that their responsibility for the trailer ceases at the end of a one-way trip, thus eliminating the cost of deadheading an empty vehicle back home.

But it is not only the shippers who depend on leased equipment. Most of the class I railroads participating in TOFC supplement use of their own flatcars by leasing specially designed piggyback cars from car companies, such as Trailer Train Company, North American Car Corporation, or General American Transportation Co. In 1959 railroads themselves owned two-thirds of the 6,835 railroad flatcars equipped for use in piggyback service. By June 1963 this figure had dropped to less than 40 percent of the total of 16,708 TOFC flatcars then in use. In its first full year of TOFC operations, 1955, the Baltimore & Ohio operated a total of 75 piggyback flatcars. At the end of 1962 it has assigned approximately 450 flatcars to piggyback operations, about 175 of which were leased from the Trailer Train Company.

Some railroads lease or sublease their TOFC flatcars to freight forwarders and private shippers. The Chicago, Milwaukee, St. Paul and Pacific Railroad Company, for example, leased a Flexi-van rail car and two trailers to an association of shippers in Seattle on an experimental basis for 6 months in 1959. The association thereafter used the railroad's plan IV service between Seattle and Chicago with such satisfactory results that it has itself directly purchased, or leased from manufacturers, a total of 5 Flexi-van rail cars and 10 trailers. The Milwaukee also occasionally leases TOFC flatcars to freight forwarders, on a round trip lease basis, when the forwarders need to supplement their own equipment during peak periods of traffic.

The Pacific Fruit Express Company is a carline company, owned jointly by the Union Pacific Railroad Company and the Southern Pacific Company, supplying a fleet of refrigerator cars to certain railroads for movement of

perishables. As of September 30, 1962, it owned 421 40-foot refrigerated trailers and 50 85-foot flatcars for use in TOFC operations. It also was operating an additional 200 85-foot flatcars under lease, and as previously mentioned, it had ordered 200 more refrigerated trailers. This equipment was designed for transportation of either perishable or dry commodities, and was acquired in contemplation of its being trip leased to shippers and freight forwarders on westbound shipments of dry freight as a return movement for perishable traffic eastbound by piggyback from west coast origins.

The Pennsylvania Railroad does not directly own the trailers that it uses in its plan II operations, or that it makes available to its shippers for plan III service. A wholly owned subsidiary corporation, Excelsior Truck Leasing Company, Inc., supplies all such automotive equipment in a flexible leasing arrangement. Trailers to be used in plan II TOFC service are leased to the railroad on a long-term basis in which pools of trailers are made available at strategic plan II terminals. Because inbound plan II traffic to certain terminals substantially exceeded the out-bound traffic and in order to make trailers available to individual plan III shippers, the original arrangement was modified in 1958 so that "surplus" trailers at plan II terminals would be returned to the control of Excelsior. In turn, Excelsior would make these trailers available to plan III patrons for one-way trip leases on a first come, first served basis. In these situations ordinarily the trip-lease forms are executed by employees of the railroad acting as agents for Excelsior. The railroad in turn is given a credit against its monthly leasing expense for the shipper rentals from Excelsior.

These trailers are trip leased to individual shippers only on condition that they be used for specific plan III TOFC shipments either to destinations on the Pennsylvania or to destinations on certain other railroads which

have agreed with it to specific interline arrangements. As far as home-line destinations are concerned, an effort is made to limit plan III trip rentals to destinations where trailers are needed by the Pennsylvania for plan II loadings.

The written lease agreement between Excelsior and an individual shipper does not specify the per-shipment charge, the free detention time, or the schedule of charges applicable at the end of the free time. These charges and practices are ordinarily explained to a shipper on its first inquiry, and are thereafter followed as a part of a general understanding governing subsequent shipments.

Excelsior charges a flat rental of $20 for conventional trailers for plan III shipments to destinations local to the Pennsylvania, and a graduated scale of rentals to destinations on certain foreign lines. For example, a shipment to Atlanta from a Pennsylvania Railroad origin point would mean a trailer rental charge of approximately $30. At the foreign line destination, the trip lease would terminate when the responsible shipper or consignee returned the empty trailer to the Atlanta rail ramp. With termination of the trip lease, responsibility for the trailer would revert to the Pennsylvania, as between it and Excelsior, and the terminating railroad in turn would be responsible to it for a per diem rental of the trailer. The terminating railroad, accordingly, would be free to use the trailer in any arrangement it wished, paying the Pennsylvania the agreed per diem rate.

The Louisville & Nashville operates a fleet of about 775 trailers in its plan II and plan III piggyback operations. Of the number about 350 are leased on an 8-year term from REA Leasing Corporation, and another 200 are available in pools assigned by REALCO to the L & N at principal points of use. It leases 24 refrigerated trailers from the Fruit Growers Express. L & N also uses foreign line trailers which are unloaded on its line, provided

that there is a specific understanding with the other railroad regarding use of the trailers for new loadings. L & N instituted plan III service in June 1960, and began its practice of trip leasing trailers to individual shippers in February 1961. It attributes to the development of trip leasing a great increase in its plan III traffic volume.

In practice, a shipper desiring to use L & N trailers in plan III service approaches the road's traffic department or one of its freight agents with a request to lease two trailers. A trip lease is prepared when the trailers are picked up at the rail ramp either by the shipper with his own tractor or with that of a local cartage company employed by him. The L & N does not use any affiliated trucking companies to perform this operation, but it will recommend independent local operators to any shipper.

The L & N has been charging a minimum $20 rental for plan III shipments to destinations local to its lines, with either a first morning or second morning delivery. The time and date of start and termination of the trip lease are shown on the lease form. The lease itself does not specify the detention privileges and limitations, but they are verbally described to shippers. When a shipper picks up the trailers prior to 10 a.m. he must return the loaded trailers to the L & N ramp prior to 6 p.m. the same day or else be subject to a $9 per day charge for ordinary trailers or $12 per day for refrigerated trailers. At the destination point the shipper is allowed free detention also until 6 p.m. on the date of delivery, at which time the daily retention charges begin to run. An individual shipper wishing to transport its own trailers in L & N's plan III service is free to do so, but then is faced with the necessity of either paying for an empty return shipment of his trailers or acquiring a return load of owned commodities.

One practice engaged in by the L & N provides an interesting example of how a TOFC movement can change in midcourse from one plan to another. At East St.

Louis the L & N receives some piggyback traffic—usually fresh meats and packinghouse products—which has originated in *plan II* service on the lines of western trunkline railroads. At East St. Louis, the trailers come under the control of the L & N which becomes responsible to the connecting western railroad for per diem charges for the foreign trailers, trip leases the foreign trailers to the shipper, and moves the trailers in *plan III* service generally to Atlanta or to Florida destinations.

Perhaps the ultimate in advantages to be gained from short-term equipment leasing is to be found in the "return" trip lease. The ordinary trailer trip lease involves a railroad, railroad affiliate, or independent company renting a vehicle to a shipper for a one-way movement. It has already been pointed out that this arrangement carries with it the understanding that the shipper's responsibility for the vehicle terminates at the destination point so that it need not bear the cost of an unproductive empty return movement. Under the return trip-lease arrangement, however, the railroad provides transportation under a published plan III TOFC rate of a loaded *shipper-owned* trailer at the published rate from a given origin to destination; then leases the trailer from the shipper after it has been unloaded at destination; and then assumes responsibility for the return of the trailer to the shipper at the origin point. The railroad, of course, is free to use the empty trailer which it has leased for any legitimate purpose, but in normal practice it does not do so, simply returning it empty to the shipper. The shipper, then, has in effect had his trailer shipped back to him at something better than no cost at all, for he has also received from the railroad some nominal sum as "lessor." Although this provision of free transportation does not seem to be widespread, it does occur in connection with certain types of TOFC operations.

Accessorial services.—A fundamental concept of plan III service and plan III pricing is that a shipper receives only

basic ramp-to-ramp rail transportation and must provide for himself all other required facilities and services. Many railroads, however, supply a labor force to load or unload plan III trailers, either at no cost to the shipper or at a negotiated price. Some TOFC tariffs provide for the railroad's performance of such accessorial services, but others do not. As pertinent here, the Elkins Act (49 U.S.C. 41) requires regulated common carriers to file and publish all rates and charges and strictly to observe them until changed according to law. It accordingly is unlawful for any person to give or receive any rebate or concession as a result of which any property—by any device whatever—will be transported at a lesser rate or will provide any other special advantage than that named in the published tariff.

During 1961 criminal proceedings were instituted under the Elkins Act against a number of railroads performing questionable loading services. Essentially, in each case the defendant railroad was performing the loading of freight for particular shippers into those shippers' trailers, with the apparent understanding that these trailers were to be shipped under plan III-type tariff arrangements. The applicable plan III tariffs provided that the loading of freight into and the unloading of freight from the trailers had to be performed by the shipper, consignee, or their agents, at the shipper's expense. In fact, the railroads were performing the loading or unloading functions, purportedly as the agents for the shippers. The railroads' tariffs did not provide for performance of the loading or unloading functions or the agency relationship.

In December 1961, the Baltimore and Ohio Railroad and the Erie-Lackawanna Railroad Company were each fined $1,000 on pleas of *nolo contendere* to criminal informations alleging that they loaded trailers for plan III shippers in circumstances such as those just described. However, in a similar, stipulated factual situation the Pennsylvania Railroad Company, on June 8, 1962, was found

not guilty of the Elkins Act violations charged. Subsequently, similar criminal charges against the Santa Fe and the Burlington railroads were dismissed at the request of the United States attorney. The extent to which a railroad may contract privately with a TOFC shipper for these and similar services incidental to TOFC transportation has thus remained unsettled.

Billing and assessment of charges.—Although all-rail TOFC services held out by the railroads throughout the country have been formed into relatively standardized tariff descriptions, there is evidence of considerable confusion and disagreement within the transportation industry as to the precise application of tariff rules, as well as evidence that published charges are not always collected. For example, as the applicable plan III rate is often based on a weight factor, it would seem that the participating railroad would assume responsibility for ascertaining the weights of the shipments tendered, either by actual weighing or through some system of certification by the shippers. In fact the class I railroads in the western district have devised procedures for certification of weights of TOFC loadings, as part of their long established bureau system of weighing and inspection. But it has become clear in this proceeding that a number of major railroads participating in TOFC operations have not been determining TOFC shipment weights by any reasonably reliable method or procedure, and therefore cannot know whether proper charges are being assessed.

Many plan III tariffs provide a rate applicable to the total weight of two trailers moving from one shipper to one consignee on one day on one bill of lading. This rule is often loosely applied, with the result that it has no consistent meaning which can be relied upon as a certainty by all potential shippers. In some instances the railroads will consider that the "tender" of two trailers in a given 24-hour period by a plan III shipper satisfies the tariff requirement. In any event it is a frequent prac-

tice for the railroads to dispatch loaded plan III trailers whenever received at the rail ramp, with the result that trailers which are paired for billing and rate puposes as single-day shipments actually are shipped on separate days for arrival at destination on different days. We have also been informed of the practice in certain types of TOFC movements (particularly in those where there has been a conversion from plan II to plan III en route from original consignor to ultimate consignee) for the railroad which is taking up the plan III segment of the shipment to neglect to issue a receipt or bill of lading until the day or so after it has forwarded the shipment. This type of delayed issuance of a required shipping document may constitute a violation of section 20(11) of the act, and can open the door to improper preferences to favored shippers, in violation of the Elkins Act.

A similar, perplexing problem for shippers and carriers has been interpretation of the "mixture" tariff rule applicable to plan III transportation of "all-commodity" traffic. Ordinarily this type of rule will provide that not more than 60 percent of the weight of a total, two-trailer shipment may consist of any one commodity or article. One frequent variation of this tariff rule provides the alternative test; not more than 60 percent of the total shipment or not more than 60 percent of 70,000 pounds. The carriers do not seem to be applying any consistent approach in determining whether commodities being shipped are the "same" commodity or article. In general, neither commodity classifications nor other published listings are used to determine whether the articles included in a single shipment are sufficiently dissimilar to constitute different commodities for the purposes of mixture rules. This state of affairs leaves a railroad free to haul straight truckloads of high-rated commodities at hidden bargain rates should it choose to do so for a favored shipper.

Bearing in mind the historical development of piggyback transportation and its present-day problems—as well

as its appealing advantages—we shall now proceed to an examination of the issues raised directly by the instant investigation.

THE PROPOSED RULES

At the prehearing conference held in this proceeding on October 9, 1962, a series of proposed rules, reproduced as appendix II hereto, was distributed. As noted at that time, they were designed to serve as a framework upon which rules ultimately to be adopted, if any, could be developed. The proposed rules represented something of a new approach to TOFC terminology as they attempted to separate TOFC service, without regard to the five numbered plans now in common use, into two more basic classes: "joint intermodal" TOFC service which would include any piggyback service performed jointly by a rail carrier and a motor or water common carrier; and "all-rail" TOFC service which would include any piggyback service in which traffic moves exclusively at rail rates and on rail billing.

The proposed rules were predicated upon the basic premise that all persons desiring to use TOFC service should be able to do so, with the charges for the same services being equal to all users, whether they be motor or water carriers, freight forwarders, or private shippers. The proposed rules B-4, B-5, C-1, and C-2 in particular were designed to implement this concept. Other important aspects of the proposed rules included a requirement that a rail carrier providing all-rail TOFC service make specific provision in its tariffs for all incidental and accessorial services offered by it in connection therewith (rules C-1 and C-2); a prohibition against the publication of joint intermodal TOFC tariffs covering commodities the transportation of which is not subject to economic regulation for their entire movement (rules B-2 and C-7); a requirement that

rail carriers providing joint intermodal TOFC service ascertain whether their connecting motor or water carriers hold appropriate operating authority (rule B-5); a requirement that where joint intermodal service is provided, the distance over an intermodal route used by a railroad and a motor carrier be not less than 90 percent of the distance over the authorized motor carrier route from origin to destination (rule B-3); a provision permitting joint intermodal TOFC service for the entire line-haul movement (rule B-7); and a prohibition against the leasing, directly or indirectly, by railroads or persons under common control with railroads of highway trucks, trailers, or semitrailers and rail cars to and from shippers or freight forwarders (rule C-3).

Section D of the proposed rules contained certain billing and notification requirements. These would have included a requirement that TOFC service be provided only when the movement was covered by a bill of lading and manifest with appropriate certification of weights and contents of trailers (rules D-1 and D-2); a regulation providing that two trailers would have to be tendered on the same day in order to qualify for a rate covering the transportation of multiple vehicles (rule D-3); and a rule which in effect permitted rail carriers to restrict the application of all-commodity rates to shipments containing no more than a designated percentage of a single commodity (rule D-5).

The Examiners' Recommendations

The examiners, in their report and recommended order, find a general need for the promulgation of rules and regulations which would have the effect of fostering the orderly development of TOFC service. The rules which they recommend be adopted are set forth in appendix III to this report. The examiners recognize the same general divisions of TOFC service into its "joint intermodal" and

"all-rail" aspects as do the proposed rules, but they find the plan-number terminology useful and retain it. Plans I and V are defined specifically, and are grouped together as "joint intermodal" service.

The examiners recommend that railroads performing all-rail TOFC service be required to publish in their tariffs all the rates, charges, and rules connected with such service, including charges for leasing of equipment, detention of trailers, accessorial services, and pickup and delivery service if any such services are offered. The ban on leasing of equipment by rail carriers and their subsidiaries to or from shippers contained in the rules as originally proposed would not be retained by the examiners. They would, however, require that all charges for the leasing and return of equipment be included in the rail carrier's tariff publications. Also recommended for adoption were a number of rules consisting largely of modifications of and improvements on those originally proposed, all of which will be discussed later in more detail.

Exceptions to the examiners' recommended order and replies to these exceptions have been filed by representative groups or associations of, or by individual, rail, motor, and water carriers, freight forwarders, and shippers, and by our Bureau of Inquiry and Compliance. In large part, the positions taken by the parties in their exceptions, or in replying to the exceptions of others, reflect those expressed in their representations and considered at length by the examiners. Like the examiners' recommendations, their arguments can best be discussed in relation to the specific topics treated below.

The Need for Tofc Regulations

If there is one predominant theme that has run through the vast majority of the many representations and pleadings filed in this proceeding, and stressed by those participating in the oral argument, it is the desire for flex-

ibility. Carriers and shippers alike agree that TOFC has already established itself as an extraordinarily significant and valuable innovation on the transportation scene and that it has an almost unlimited future ahead of it. Many of the parties have urged that we take no action here which might have the effect of restricting the growth of piggyback, of forcing it into any fixed mold, or of limiting in any way the inauguration and development by the transportation industry—and particularly the railroads—of new types of TOFC services and of new variations on or applications of present services.

There can be no doubt of the benefit which TOFC service has already rendered the railroads in allowing them to recapture traffic lost to competing modes of transportation, and especially to private motor carriage. Also benefiting have been the motor carriers, which have been provided with an opportunity, through the use of plan I TOFC service, to obtain efficient line-haul transportation and thus to help themselves even while their business helps their rail competitors; the freight forwarders, which have been afforded an economical means for transporting the small shipments which they consolidate; and—most important—the shippers and the general public which ultimately reap the benefits of the increased efficiency and economy that are invariably the result of the combination of competing forces so that each operates in the area where it functions best.

It is our purpose and our hope to encourage the growth of this transportation phenomenon. Large-scale piggyback has had a short history, but it is obviously no longer an infant. Perhaps we might characterize it as a fast-developing teenager, healthy but not without some growing pains. Looking back on some of our past decisions—decisions which must necessarily affect the future of TOFC service because they contain definitions or restrictions which could hamper its logical development—it is apparent that

most of them were rendered during the infancy of this transportation prodigy, and some, like *Motor-Rail-Motor Traffic in East and Midwest,* 219 I.C.C. 245, might almost be said to have predated its birth. The fact that these decisions were handed down before anyone could have realized the important place TOFC service was destined to attain does not mean that they reached erroneous results, but it does mean that their pronouncements need to be reexamined in the light of modern developments.

The assembling of the information necessary for such a reevaluation was one of the principal reasons for our embarking on a general investigation of piggyback operations, and the factual material which has been introduced into this record, and which will be of great value to us in the future administration of the act, alone amply justifies this proceeding. The need for information relating to TOFC service will, of course, be a continuing one if we are to remain properly informed for the future, and to keep it flowing we have recently revised certain of our reporting requirements in docket No. 34364, *Piggyback Traffic Statistics,* to call for the quarterly reporting of TOFC traffic data by railroads, motor and water carriers, freight forwarders, and the Railway Express Agency.

In addition to our desire to fill the gaps in our available knowledge about TOFC operations, there had arisen, shortly before this proceeding was begun, certain immediate and pressing problems which required solutions. For example, *National Auto. Transporters Assn.—Declaratory Order,* 91 M.C.C. 395 (the *NATA* case), had presented anew the questions whether contract carriers should be allowed to use TOFC service—a question answered in the negative in the *New Haven* case, *supra;* whether interchange of TOFC traffic between rail and motor carriers should be allowed at other than common points of service—an issue which had been treated earlier in *Gilbert Carrier Corp. Extension—Kearny, N. J.,* 72 M.C.C. 204; and how the

certificates, peculiar to carriers of motor vehicles, limiting service to initial or secondary movements should be interpreted vis-a-vis piggyback operations. *Gordons Transports, Inc.* v. *Strickland Transp. Co.*, 318 I.C.C. 395, had raised again the problem, first considered in *Substituted Rail Service by Red Ball Transfer Co.*, 52 M.C.C. 75 and 303 I.C.C. 421, of the use by a circuitous motor carrier of a more direct rail TOFC service between authorized points. The propriety of the extensive practice of leasing trailers for use in TOFC service between rail carriers or their affiliates and shippers, and the apparent opportunities for rebates and discrimination afforded by this practice, had been called to our attention by our field employees. The need to deal consistently with the problems presented in each of these situations was instrumental in persuading us that a proceeding such as the instant one was necessary.

The information that we have received from the parties and the arguments which we have read and heard make it apparent that there are many differences of opinion as to the wisdom and the correct application of some of our past decisions. This proceeding affords the opportunity to explore the areas in which the differences exist. Also, there have been revealed some abuses in the performance of piggyback service. To cite a single example, it is clear that some railroads, in spite of the fact that their rates for transporting loaded trailers in TOFC service are based on maximum weights, make no attempt to ascertain the actual weight of the shipments tendered to them and are failing to collect their published charges.

We think that the record clearly supports the conclusion that it would be in the public interest to lay down, through formal rules, certain guidelines for TOFC service and practices. We visualize these rules as an aid in furthering, not restricting, the growth of piggyback, as providing some standardization of industry practices, and as a means of insuring that this recent and valuable transportation

development is made available to all persons who are able to make effective use of it. Some of the rules to be adopted here are simply interpretive, but we think it well to have summarized and assembled in convenient form the various requirements of the Interstate Commerce Act as they relate to piggyback operations. Other rules take the form of tariff and billing requirements. Still others may be said to implement the broad provisions of existing legislation. A few of the parties challenge the legality of our prescribing rules—particularly of the last-mentioned kind—but we think we have ample authority to take such action. Under parts II, III, and IV of the act, we are given a general rulemaking power by sections 204(a)(6), 304(a), and 403(a), respectively; and in section 12 we are "authorized and directed to execute and enforce" the provisions of part I. The Courts have recognized our rule-making authority. See, for example, *Assigned Car Cases,* 274 U. S. 564, 575 et seq. (1927), which arose under what is now part I of the act; *American Trucking Assns.* v. *United States,* 344 U. S. 298, 308-13 (1953), which arose under part II; and *United States* v. *Pennsylvania R. Co.,* 323 U. S. 612, 616 (1945), in which the Supreme Court pointed out that the act, since its inception—

has contained broad language to indicate the scope of the law. The very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms. Congress has, in general, left the contents of these terms to be spelled out in particular cases by administrative and judicial action, and in the light of the Congressional purpose to foster an efficient and fair national transportation system.

The proposed rules distributed to the parties at the prehearing conference contained several ideas which appeared to many to be both radical in approach and stultifying in net effect. Particularly criticized have been rule C-3 which

would have flatly prohibited the leasing of trailers for use in TOFC service; rule B-4 which would have required that the charges received by a rail carrier under a division of revenues for performing part of a joint intermodal TOFC movement could be no greater than its compensation for performing all-rail service between the same points; and the statement in the material accompanying the draft of the proposed rules to the effect that they did not contemplate the use of TOFC service by motor contract carriers. Proposed rules such as these were largely designed to draw as much comment as possible from various components of the transportation industry to the end that we might obtain as much assistance as possible from every faction in making our final determinations. The response has demonstrated that they have served this purpose well.

We cannot help but be aware that the development of TOFC transportation is not at a standstill, and that whatever we do here will not be the final and definitive word on all the ramifications of piggyback service. If any of the regulations to be adopted here should prove in practice to have the unwanted effect of in any way hampering the flexible development and free use of TOFC service, we feel sure that this fact will promptly be called to our attention by the affected carriers or shippers so that appropriate remedial steps can be taken.

Definitions

Part A of the proposed rules contains suggested definitions for three terms: "Trailer-on-flatcar (TOFC) service," "Joint intermodal TOFC service," and "All-rail TOFC service". The plan-number terminology is not used at all in the proposed rules, but it is immediately apparent to those accustomed to thinking of piggyback services in this way that "joint intermodal" TOFC service includes what has come to be called in the industry plans I and V,

while all-rail TOFC service includes plans II, III, and IV and variations thereof. The examiners used the plan-number terminology throughout their report, and in their recommended rules they provided definitions for plans I and V.

We agree with the examiners, and with virtually all the parties, that the five numbered plans have become firmly ensconced in transportation language, and we are certain that the various TOFC services will continue to be referred to in such terms regardless of what we do here. At the same time, we think that the grouping of these different services into two major classifications—intermodal service, in which traffic moves pursuant to a negotiated agreement for the division of revenue between carriers of different modes, and all-rail, or open-tariff, TOFC service, in which only a rail rate is involved—represents a genuine and useful distinction. In the rules which we are adopting here, this distinction is retained, but we see it as one which simply exists as a necessary element of TOFC service, not as one which has to be, or should be, imposed by definition.

Moreover, we do not think it advisable to attempt a formal definition of plan I or plan V TOFC service. Again the distinction between them is a real one, and it is convenient to refer to the different types of intermodal service by these handy and well-recognized terms. We are, obviously, using them in this report. But while they represent a convenient form of shorthand, their use is not essential to the explication of TOFC regulations. One of the few parties commenting on the proposed definitions in its exceptions, the Southern Railway System, takes the position that the definitions contained in the examiner's recommended rules 2 through 5 are unnecessary and could lead to confusion. We are inclined to agree. The attempt specifically to define certain types of TOFC operations could well prove futile, as well as unnecessarily restrictive, in view of the industry's demonstrated capacity to develop new

services and variations on old ones. The rules to be adopted, then, will contain a formal definition only of TOFC service itself.

TOFC service would have been defined in proposed rule A-1 as follows:

"Trailer-on-flatcar (TOFC) service" means the transportation, in interstate or foreign commerce, of any freight-laden highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis) on a rail car, and/or the return transportation, in interstate or foreign commerce, of any empty highway truck, trailer, or semitrailer (or the demountable container portion thereof) on a rail car.

The examiners pointed out that the meaning of "return transportation" might be subject to more than one interpretation, and they recommended the following modification of the definition, in their rule 1:

"Trailer-on-flatcar (TOFC) service" means the transportation, in interstate or foreign commerce, of any freight-laden or empty highway truck, trailer, or semitrailer (or the containerportion of any highway truck, trailer, or semitrailer having a demountable chassis) on a rail car.

On exceptions, the Western Railroads contend that this form of the definition might also create interpretive problems as it could be construed to include the transportation of new trucks and trailers shipped by a manufacturer and not actually being used in performing piggyback service. They propose an alternative form of the definition which, we believe, meets this objection and clearly and adequately defines TOFC service. We shall, therefore, adopt it, with minor modifications, as our rule 1:

1 *Definition of TOFC service.*—Trailer-on-flatcar (TOFC) service means the transportation on a rail car, in interstate or foreign commerce, of *(a)* any freight-laden

highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis); or *(b)* any empty highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis) when such empty equipment is being transported incidental to its prior or subsequent use in TOFC service as defined in subparagraph *(a)* of this section.

Several of the parties object that the examiners' recommended rules as a whole, and particularly the definitions contained in rules 2, 3, and 4, fail to provide for the use of TOFC service by water carriers subject to part III of the act. There is now some use by such carriers of TOFC service in lieu of authorized water service between certain Florida ports. It was certainly not our intention in instituting this proceeding to preclude the continuance of such operations, and the rules to be adopted will make provision for the use by water carriers of piggyback service. Operations of this kind should not be confused with those in which water carriers transport their own or other carriers' or shippers' trailers or containers by water in so-called fishyback service. That portion of the instant proceeding involving the latter type of service has been separated from the other issues involved herein for individual treatment and oral hearing by order entered November 12, 1963.

Open-Tariff Tofc Service

Every TOFC service necessarily involves the participation of a railroad which performs certain line-haul transportation. This fact, so obvious that it may seem banal to draw attention to it, is of fundamental importance in any consideration of either the practical or legal aspects of piggyback operations. So too is the further proposition

that because TOFC operations involve the rendering of a rail service, they also involve the earning of some compensation by a rail carrier and the provision, through some form of tariff publication, for transportation charges, at least a portion of which will ultimately be received by a rail carrier.

There are only two ways in which a rail carrier can provide for receiving compensation for its transportation services. It can through tariff publication establish charges, which must be just and reasonable, for a particular service to be rendered, or it can enter into joint-rate arrangements with other carriers and establish divisions, which must also be just and reasonable, of the charge established jointly for the through service. The proposed rules, in attempting to achieve the end that TOFC service be made available to all at equal charges, took an approach which would have required that the divisions received by a rail carrier providing joint intermodal service could not exceed any all-rail TOFC rate maintained by the rail carrier for like services. Proposed rule B-4 would provide:

> The railroad or railroads providing TOFC service jointly with motor or water common carriers shall receive no greater compensation or charge for its or their portion of the total intermodal movement than it or they would receive under any all-rail TOFC terminal-to-terminal rates or charges maintained for like service between the same points.

Also, proposed rule B-5 would have required any rail carrier providing joint intermodal TOFC service with any motor or water carrier to do so indiscriminately with other such carriers. This rule reads as follows:

> Any railroad which provides TOFC service jointly with any motor or water common carrier shall not refuse to enter into a like arrangement with other motor or water common

carriers under similar circumstances and conditions, except that such railroad shall have the duty of ascertaining whether the connecting motor or water carriers hold appropriate authority to transport the involved commodities. If the connecting motor or water carriers do not hold such authority, no joint intermodal TOFC service shall be performed with respect thereto.

The hearing examiners rejected both these proposed rules,[3] and we think that they were correct in doing so. We do not believe that it would be practical to attempt to control by a rule of general applicability the level of compensation to be received under division agreements which are, by nature, private contracts negotiated by individual carriers. We are, nevertheless, still concerned with the concept of equal TOFC charges for all underlying the proposed rules. For this reason, in the notice setting this proceeding for oral argument, another approach was suggested, and the parties were asked to discuss "Whether, and under what circumstances or requirements, TOFC service provided under an 'open tariff' can and should be made available to everyone (including freight forwarders, express companies, and common and contract motor and water carriers, exempt or regulated)."

It is the concern of the rail carriers that should motor carriers be given the opportunity to utilize TOFC service at the open-tariff rate for their line-haul movements, they will be in a position to divert traffic from all-rail TOFC service. Those supporting the extension of open-tariff TOFC service to other carriers point, on the other hand, to the obvious fact that whenever such service is used, whether by private shipper, freight forwarder, or competing carrier, the immediate result is revenue for the rail-

[3] They did, however, recommend adoption, in their rule 9, of the substance of the second portion of proposed rule B-5 requiring rail carriers to ascertain whether connecting motor carriers hold appropriate authority to join in TOFC service. This matter will be discussed subsequently.

road. Why, they ask, should a railroad object to receiving additional business? The only concrete, practical answer to this query by any railroad party to this proceeding is that there may be situations in which a TOFC open-tariff rate between two given points is established, for competitive reasons, at a particularly low level, and that by using TOFC service between two such points a motor carrier could take advantage of the favorable rate in the performance of part of its line-haul transportation and thus provide service at points beyond those named in the TOFC tariff at a lower rate than, and thus to the ultimate detriment of, the railroad.

It is argued by some that the use of open-tariff TOFC service by carriers would be in contravention of the stated national transportation policy "to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each * * *." The Western Railroads, for example, in their reply to exceptions argue that motor carriers would thus be able to "exploit" the railroads' "acknowledged inherent advantage as the nation's low-cost line-haul carrier of goods for great distances," and that this "inherent advantage would be submerged, to be used as a means by which motor carriers could establish their primacy in surface transportation." What they overlook is that *all* TOFC service is inherently bimodal in that its basic characteristic is the combination of the inherent advantages of rail and motor transportation: the railroad's ability to provide efficient line-haul transportation of huge volumes of freight for great distances at high speed; and the motor carrier's ability to provide door-to-door, and if necessary job or farm-site, pickup and delivery. TOFC could even be said to be *trimodal*, because added to the two factors already mentioned is its ability to combine in a type of container service many small shipments—a type of service which has

become associated with the business of the freight forwarder.

It should not be forgotten in considering the arguments advanced here that all three—rail carrier, motor carrier, and freight forwarder—are even today providing, through the use of piggyback, services which in physical characteristics are substantially similar. Any one of the three can offer a transportation service which includes door-to-door pickup and delivery, movement of loaded trailers between a shipper's premises and a rail yard, and line-haul transportation of the loaded trailers by rail. The railroad does this under its plan II TOFC tariff; the trucker does it under plan I, in which it is encouraged by the railroads (all railroads participating in this proceeding except the Southern Railway System favor continuation of plan I); and the freight forwarder does it through use of plans III and IV rail tariffs.

We think that the rail carriers' fear that the free use of open-tariff piggyback service by motor carriers would end in the elimination of the inherent advantage of rail transportation is misplaced. On the contrary, it seems obvious to us that the inherent advantages of each mode of transportation can be given freest play through the highest degree of coordination, and that encouragement of such coordination is in the public interest. We might also note that the presidential transportation message of 1962 asked that all carriers be assured the "right to ship vehicles or containers on the carriers of other branches of the transportation industry at the same rates available to non-carrier shippers," so that the various carriers would be placed "in a position of equality with freight forwarders and other shippers in the use of the promising and fast-growing piggyback and related techniques."

Those protesting against the legality of the use by a carrier of open-tariff TOFC service point to a line of our decisions in which we concluded that it was "repugnant to

the act" for a person to act as both a carrier and a shipper which respect to the same service. That such was stated in a number of cases cannot be disputed, but it should also be noted that when this proceeding was instituted, one of its stated-goals was the "reexamination of existing Commission precedents and pronouncements governing coordinated and substituted service transportation." It is argued, however, that this longstanding and consistent administrative interpretation of the act must be deemed to have received the effect of law and that we are precluded from changing it. Cited as supporting this general rule are *United States* v. *Leslie Salt Co.*, 350 U. S. 383 (1956); *Helvering* v. *Winmill*, 305 U. S. 79 (1938); and *Atchison, T. & S. F. Ry. Co.* v. *United States*, 209 F. Supp. 35 (1962). Certainly, were we summarily to reject past Commission holdings and attempt somehow to penalize some individual party subject to our jurisdiction for engaging in a course of conduct in which we had followed those holdings, the principle enunciated in the cited cases would be applicable. We do not, however, understand the courts to have taken the inflexible position that an administrative agency, even if it has followed a consistent line for some time, cannot, when faced with new developments or an appreciably changed factual picture in the segment of the national life which it is charged with regulating, alter its past interpretation in a formal proceeding such as this where rules having future effect are to be issued. When cogent reasons and the public interest compel it, even a consistent and generally unchallenged administrative practice may be overturned. Compare *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315 (1933).

So far as we have been able to determine, the first time the Commission made the definite statement that a person could not act as both carrier and shipper as to the same service was in the 1939 decision in *Substituted Freight Service*, 232 I.C.C. 683. That proceeding arose soon after

the beginning of Federal regulation of interstate motor carriage and was directed toward determining whether certain special permissions granted as a temporary measure to permit continuance of substituted service arrangements of a type prevalent prior to the effective date of part II of the act should be renewed. The special permissions allowed publication of tariff rules which in turn provided for the substitution of motor for rail, water for rail, and rail for water service. They did not require motor common carrier operating authority as a prerequisite for the substitution of motor service for rail or water service; they permitted substitution at the carrier's option, without giving the shipper a negative option; and they did not call for the identification of the parties participating in the substituted service or of the routes to be used therein. The Commission concluded that the special permissions should not be renewed, and in doing so made three specific findings: (1) that the service substituted for common carrier service is itself common carriage and cannot be performed by motor vehicle in the absence of appropriate motor common carrier authority, (2) that the substitution of one form of transportation for another where the shipper otherwise directs would be a breach of the contract of carriage, and (3) that the routes over which substituted service is performed and the parties performing it must be fully set forth in lawfully filed tariffs. Certainly, we would not dispute any of these findings; in fact, we shall incorporate them in the rules to be adopted.

The statement that a person may not act as both carrier and shipper as to the same service appears first at page 688 of the report in *Substituted Freight Service, supra.* The Commission there noted that the substituted service practices of the eastern rail carriers differed from most others in that these railroads utilized "so-called contract carriers" in such service, and that they "argue that neither they nor such contract carriers are or should be

required to act as common carriers by motor vehicle in their relation to the public." The report then states, without explanation or supporting precedent: "But they cannot act as common carriers by rail and shippers by motor vehicle as to identically the same service." Later, on page 690, in discussing an arrangement whereby Consolidated Freight Lines, Incorporated, substituted rail service for its authorized motor service between Minneapolis, Minn., and Terry, Mont., the Commission said:

It appears that between these points it acts as a forwarder or shipper and assembles the traffic tendered by the individual shippers into carload lots, paying the railroad the carload rate between Minneapolis and Terry and assessing the individual shipper or consignee its less-than-truckload rate between primary origin and destination. But for it to act as a common carrier by motor vehicle and as a shipper by rail as to the same service is just as repugnant to the act as the reverse situation of the eastern rail carriers, although in this instance it appears that it actually has common-carrier rights between Minneapolis and Terry.

Considering the limited nature of the ultimate findings in *Substituted Freight Service, supra*—that is, that service substituted for common carriage must itself be common carriage and that the tariff publications allowed under the special permissions were legally insufficient—it is not clear to us why the underlying conclusion that a person may not be both shipper and carrier with respect to the same service was necessary to the determination of the case. A contrary result had previously been reached in 1936 in *Trucks on Flat Cars between Chicago and Twin Cities*, 216 I.C.C. 435. There the Chicago Great Western Railroad had published, prior to the passage of part II of the act, an open-tariff TOFC rate which was primarily designed to attract the traffic of a motor common carrier, Keeshin Motor Express Company. The rate was approved, and the Commission commented, at page 444, "We have here a pub-

lished tariff, and a motor carrier would have the same right to make shipments thereunder as any other member of the body politic." Later, when motor transportation was made subject to our regulation, thus making possible the filing of joint motor-rail rates, the Great Western and Keeshin joined in publishing such rates, which were approved in *Motor-Rail-Motor Traffic in East and Midwest*, 219 I.C.C. 245. The Great Western stated at that time that its intention was to withdraw the open-tariff rates previously approved, but the Commission in no way indicated that such a tariff could not be used as originally proposed; that is, by motor common carriers. Nor did it in *Substituted Freight Service, supra*, either specifically overrule or attempt to distinguish *Trucks on Flat Cars between Chicago and Twin Cities, supra*.

These considerations lead us to the conclusion that the Commission in *Substituted Freight Service*, in saying that a person could not be shipper and carrier as to the same service, did not intend to proscribe the kind of substituted service originally intended by the Great Western and Keeshin in which one common carrier service is substituted for another through the use of an open-tariff rate of the carrier performing the substituted service—provided that proper notice is given in the tariff publication of the carrier using the substituted service. What this language was directed at, as we understand it, was the use of open-tariff service by a carrier not acting in its proper role of carrier, but acting instead as a shipper or forwarder. Such a situation might occur were a carrier to tender a shipment to another carrier for transportation to a point it cannot serve or over a route it cannot use, or without providing in its tariffs for the substitution. Consistent with this interpretation is the fact that the report characterizes Consolidated's operation between Minneapolis and Terry as that of a *forwarder* or *shipper*. Presumably, had Consolidated, through an appropriate tariff publica-

tion of the kind prescribed in *Substituted Freight Service,* held out its service as a *motor carrier,* through the use of substituted service, the arrangement would have received the same approval as did the original Great Western-Keeshin proposal.

We think that certain other language in the report in *Substituted Freight Service, supra,* also tends to support this conclusion. At page 688 it is said:

> In either event, where the substitution service consists of a combination of line-haul movements by rail and motor, it is in legal effect a joint service, no matter by what other name it may be designated. Under the act and our regulations thereunder, it is fundamental that the service covered by published rates, the routes over which it is performed, and the names of the carriers performing the service must be set forth definitely in the governing tariffs for the information of the shipping public, interested carriers, and the regulatory body, in order to insure the effective and fair administration of the act.

> Again it should be noted that the emphasis is placed upon the proper publication and notice to the shipping public, and that there is no requirement that what is called a "joint service" can only be performed under joint rates and not pursuant to a properly published substitution arrangement using the open-tariff rates of the underlying carrier. Admittedly, certain of our decisions, including *Ringsby Truck Lines, Inc.* v. *Atchison, T. & S. F. Ry. Co.,* 263 I.C.C. 139, 141; *Savage Application,* 265 I.C.C. 157, 167, and the *New Haven* case, *supra,* have followed a contrary interpretation of the *Substituted Freight Service* case. We are now of the opinion, however, that these decisions, although we do not doubt that when made they represented sound conclusions, are incorrect in the light of this record and current conditions. Two other decisions cited by those opposing the use of open-tariff TOFC service by motor carriers, *Greer Broker Application,* 23 M.C.C.

417, and *Stone's Exp. Inc., Common Carrier Application*, 32 M.C.C. 525, are consistent with our present interpretation of *Substituted Freight Service, supra.*

Another argument which is advanced by a number of the parties is that any intermodal operation in which transportation services are performed by two or more carriers will necessarily result in the creation of a *de facto* through route. Because we are without statutory power directly to require the establishment of through motor or motor-rail routes, this argument continues, we are also without power indirectly to require their establishment by compelling rail carriers to provide open-tariff TOFC service to other carriers. It is, of course, well established that what is a through route is a matter of fact, and that a through route may be found to exist in the absence of a joint rate or any other express arrangement between the carriers involved. *Denver & R. G. W. R. Co.* v. *Union Pac. R. Co.*, 351 U. S. 321 (1956); *Thompson* v. *United States*, 343 U. S. 549 (1952); and *Hausman Steel Co.* v. *Seaboard Freight Lines, Inc.*, 32 M.C.C. 31, 37, and cases cited therein. However, to say that we would be requiring the establishment of through routes merely by finding that it is lawful for a motor carrier to use the open-tariff TOFC rate of a rail carrier overlooks the fact that such a finding would involve no compulsion whatever—either on rail carriers to hold out a TOFC service or, if they do, on motor carriers to use it. We find this argument to be without merit.

We can see no justification, either from the standpoint of legislative limitations or of policy considerations, for holding that one carrier may in no circumstances make use of the services which another carrier holds out to the public generally. So long as the first carrier is operating *qua* carrier and gives the public proper notice through its tariffs, it can substitute another's service for its own in this way. Of course, should the first carrier hold out to perform what may amount only to assembly and dis-

tribution services at points, and should it use the underlying transportation of the second carrier between points, which it cannot itself serve in a practicable manner, it would no doubt be found to be operating not as a carrier but as a freight forwarder as defined in section 402(a)(5) of the act. Where it does have the requisite authority, it may perform such service not as a forwarder but as a carrier because section 402(a)(5) defines a freight forwarder as any person performing forwarding services *other than as a carrier subject to parts I, II, or III of the act.* We are aware of no other legal impediment to the use of an open-tariff service by any carrier, whether common or contract, and whether or not subject to our regulatory jurisdiction.

Section 2 of the act requires rail carriers subject to part I to make "like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions" available to any person at a charge no greater and no less than that received from any other person. It might be argued, however, that service provided for a competitor could not be said to be performed "under substantially similar circumstances and conditions" as that provided for private shippers.

Whether two or more transportation services were performed "under substantially similar circumstances and conditions" would be a matter of fact to be determined in each individual case as it arose, but we see no reason why the fact that the user of a service was another carrier rather than a private shipper would compel the conclusion that dissimilar circumstances and conditions were present. In *Louisville & N. R. Co.* v. *United States,* 282 U. S. 740, 753 (1931) the Supreme Court, in upholding a finding of the Commission that transportation by railroads of private passenger cars owned by other railroads at other than published tariff rates was unlawful, refused to recognize any distinction between the transportation of

cars owned by railroads and private shippers. The Court noted that all such cars are hauled between the same points, on the same line, in the same or like trains, and in the same manner. This is equally true of the transportation of loaded highway trailers in TOFC service. See also *Warehouse Co.* v. *United States,* 283 U. S. 501, 511-12 (1931).

Some rail carriers are apprehensive lest they be forced to offer TOFC service to possibly financially irresponsible motor carriers, thus running the risk that they would not be paid for their services or that they would be required to handle unsafe motor vehicles. Obviously, a railroad would be free to deal with a motor carrier wishing to use open-tariff TOFC service just as it deals with any private shipper. Thus, the rail carrier, through a tariff rule such as Rule 9 of the Uniform Freight Classification, can require that an insolvent or financially unreliable motor carrier prepay freight charges, or it can provide that shipments not be surrendered until such charges are paid. Also, it is clear that it would not be in the public interest to allow, much less to require, any carrier to utilize unsafe equipment. Rule 6(b), adopted subsequently in this report, will deal with this matter.

We conclude that when TOFC service is offered by a rail carrier to the public generally, there is nothing to preclude its use by motor or water common or contract carriers, in lieu of their all-highway operations in the performance of authorized transportation between authorized service points, or by for-hire-carriers engaged in transportation which is exempt from economic regulation. To the extent that this conclusion differs from that expressed in any of our previous decisions, including the *New Haven* case, *supra,* such decisions are hereby overruled. The following rules will be adopted to reflect this conclusion:

2 *Availability to all of TOFC service.*—TOFC service, if offered by a rail carrier through its open-tariff publica-

tions, shall be made available to any person at a charge no greater and no less than that received from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similiar circumstances and conditions.

3 *Use of open-tariff TOFC service by motor and water carriers in the performance of economically regulated transportation.*

(*a*) Except as otherwise may be prohibited by these rules, motor common and contract carriers, water common and contract carriers, and freight forwarders may utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier.

(*b*) Motor and water common carriers shall utilize open-tariff TOFC service only if their tariff publications give notice that such service may be utilized at their option, but that the right is reserved to the user of their services to direct that in any particular instance TOFC service not be utilized.

(*c*) Motor and water contract carriers shall utilize open-tariff TOFC service only if their transportation contracts and schedules make appropriate provision therefor.

(*d*) Tariffs of motor and water common carriers and contracts and schedules of motor and water contract carriers providing for the use of open-tariff TOFC service shall set forth the points between which TOFC service may be performed and the names of the rail carriers whose TOFC service may be utilized.

JOINT INTERMODAL SERVICE

Having concluded that there is neither legal nor policy bar to the use by motor and water carriers of open-tariff TOFC service proffered by rail carriers generally, and that such use should be allowed in the public interest, we come next to a consideration of the proper status and scope which joint intermodal TOFC service should possess in the broad pattern of piggyback regulation and service.

Appendix B.

Initially, it must be noted that no one questions that voluntary coordination between the several modes of transport should be encouraged and promoted to the fullest extent possible in the interests of both the carriers and the shipping public. Nor does anyone assert that there is anything improper or unlawful with respect to properly published, through-route and joint-rate arrangements among the various modes of carriage. Rather, what is challenged by certain of the parties herein is whether certain operations and services, and the tariffs embracing rates and charges therefor, properly fall within that class of coordinated intermodal service which is allowable under the act. In order to examine this issue in its proper perspective, it is necessary to review briefly the legal growth and development of that kind of piggyback service which embraces the participation of both rail and motor common carriers.

Prior to August 1935, when part II of the Interstate Commerce Act became law, the motor carrier industry was not subject to Federal regulation and such carriers, therefore, could utilize the services of railroads as could any shipper. *Trucks on Flat Cars Between Chicago and Twin Cities,* 216 I.C.C. 435. Part II of the act, however, subjected motor carriers to economic regulation by this Commission, and section 216(c) thereof provided in specific terms that motor common carriers may establish reasonable through routes and joint rates with rail carriers. Shortly thereafter, the Chicago Great Western Railroad Company and certain motor common carriers proposed motor-rail-motor rates between Chicago and various points east thereof, on the one hand, and, on the other, Minneapolis-St. Paul, Minn., and certain points in contiguous territory. The proposed rates were of the same amount as the corresponding all-highway rates published by the participating motor carriers, and the rail service of the Great Western was to be performed (substituted) between Chicago and St. Paul. These rates were approved by the

Commission in November 1936, in *Motor-Rail-Motor Traffic in East and Midwest*, 219 I.C.C. 245, the first reported Commission decision dealing with the subject of coordinated service by rail and regulated motor common carriers. The Commission stated, at pages 272-73:

One of the protestants contends that the proposed routes are inconsistent with the provisions of section 217(a), which impose a duty upon a common carrier by motor vehicle to publish rates between points on its own route, and whenever it enters into a through-route and joint-rate arrangement with a common carrier by railroad to publish rates between points on its own route and points on the route of such railroad. This protestant claims * * * that joint rates are authorized only between a point on the route of a motor carrier, on the one hand, and a point on a rail line, on the other. We have frequently approved through routes and joint rates in connection with a rail carrier serving the points of origin and destination and another rail carrier participating only as an intermediate carrier in the transportation.

Section 216(c) does not define the particular type of through routes therein authorized to be established, the only requirement being that they shall be reasonable. * * *

As many considerations bear upon the feasibility and practicability of such arrangements, we cannot conclude that the proposed through routes are unlawful because similar routes are not provided from and to all points on the line of the participating rail carrier. Nor can we accept the contention that because the haul which a motor common carrier might receive on some traffic would be short, or terminal in character, that it may not participate in such a joint rail-motor route.

In finally approving the motor-rail-motor rates proposed, the Commission conclusively found such rates to be valid joint rates, saying, at page 274:

One of the protestants argues with great insistence that it is unlawful for a motor carrier having authority to operate over particular routes to "substitute transportation of

its motor vehicles on flat cars over a totally different route for its highway operations." This argument assumes that under the proposed arrangement the status of respondent motor carrier with respect to the rail portion of the transportation would be that of a shipper. Nothing in the evidence warrants that assumption. *The motor carrier's status is that of a connecting carrier under a joint-rate arrangement which, as previously indicated, is specifically authorized by law.* The novel way in which the traffic is handled does not affect the status of the participating carriers in that agreement. It does not appear that any portion of the transportation which the motor carrier would perform under the arrangement would be over routes other than those over which it may lawfully operate. [Emphasis supplied.]

About 2 years following this decision, the Commission instituted an investigation into the lawfulness of certain special permission tariff rules and other practices of common carriers by rail and water subject to part I of the act and of common and contract carriers by motor vehicle subject to part II, in connection with the substitution of motor-vehicle service for rail or water service and of rail or water service for motor-vehicle service. After extensive consideration of the background of substituted service generally, the Commission in *Substituted Freight Service,* 232 I.C.C. 683 (decided July 25, 1939) found, as relevant to the issues presented here, that where a common carrier by one transport medium substitutes another form of transportation therefor, it breaches its bill-of-lading contract with the shipper unless the shipper is apprised of such optional substitution of service by appropriate tariff provisions; and that so-called substituted service may not lawfully be furnished without setting forth the service, the routes over which it is performed, and the parties performing same in lawfully filed tariffs. In arriving at these conclusions, the Commission remarked, at pages 687-88:

There can be no doubt that the interstate transportation service here under consideration is common-carrier service

and that either the rail carrier must have authority to engage in common carriage by motor vehicle in its own right, or the motor carriers joining in such service must be authorized to act as such carriers in their individual capacities. [Footnote omitted.] In either event, where the substitution service consists of a combination of line-haul movements by rail and motor, it is in legal effect a joint service, no matter by what other name it may be designated. Under the act and our regulations thereunder, it is fundamental that the service covered by published rates, the routes over which it is performed, and the names of the carriers performing the service must be set forth definitely in the governing tariffs for the information of the shipping public, interested carriers, and the regulatory body, in order to insure the effective and fair administration of the act.

Noting the contentions of certain respondents in that proceeding to the effect that the maintenance of ordinary joint rates covering the considered service would be "rigid, inflexible, cumbersome, uneconomical, unexpeditious, expensive, and impractical," the Commission approved a suggestion of certain of the southern and western rail carriers under which the substituted service could be covered by a tariff rule and directory containing a list of participating rail, motor, and water carriers, and showing between what points the substituted service is performed. In thus sanctioning a form of tariff publication now known as a "Substituted Freight Service Directory," the Commission stated, 232 I.C.C. at page 689:

It appears that this substituted service, confined as it is to on-line points served by the originating or destination carrier, is of such a nature as readily to lend itself to such method of tariff publication. Any possible breach of contract could be avoided by inserting the words "unless otherwise directed by the shipper" or a phrase of similar import in an appropriate place in the tariff rule. It appears that such publication in the form of a tariff rule and directory could be devised so as to preserve the benefits of the sub-

stituted service without subjecting the carriers to undue expense or contravening the specific provisions of the act, and thus to protect the rights of competing carriers and the general public.

While limited TOFC operations had been conducted at various times during the 1930's and 1940's by a few railroads and motor common carriers, there was a notable resurgence of interest in this type of service during 1953. Late in that year, The New York, New Haven, and Hartford Railroad Company presented to the Commission for its consideration 20 questions concerning the legal relations, limitations, and obligations incident to the transportation of highway trailers on railroad flatcars. In response to such questions, the Commission, in *Movement of Highway Trailers By Rail*, 293 I.C.C. 93 (decided July 30, 1954), referred to its past decisions in the coordinated and substituted service field, and confirmed the holdings of those cases. It stated, beginning at page 106:

we are of the opinion that trailer-on-flatcar transportation is in fact transportation by railroad. And this is so whether the trailers are owned or operated by railroads, shippers, or motor common carriers.

A joint rate is one that applies to transportation extending over the lines of two or more carriers, and which is made by arrangement or agreement between such carriers and is evidenced by concurrence or power of attorney. 49 CFR 141.0 (b)(3). In *Substituted Freight Service, supra*, we said that "where the substitution service consists of a combination of line-haul movements by rail and motor, it is in legal effect a joint service, no matter by what other name it may be designated." We recognized that substituted freight service presented certain problems in the publication of tariffs, and indicated that interested carriers might confer with representatives of our Bureau of Traffic to work out a simplified form of tariff publication. * * * We stated that if publication takes the form of a directory, it should be published with appropriate concurrences of the rail and motor carriers listed therein. * * * In these circumstances, *this substituted freight serv-*

ice directory, and the related rate tariffs which make reference thereto, may be said to conform to the requirements as to the publication of joint motor-rail rates, [Emphasis added.]

Subsequently, in *Substituted Rail Service by Red Ball Transfer Co.*, 303 I.C.C. 421 and *Substituted Service—Consolidated Freightways, Inc.*, 305 I.C.C. 301, *aff'd. Consolidated Freightways, Inc.*, v. *United States*, 176 F. Supp. 559 (N. D. Cal. 1959), other substituted rail-for-motor service proposals were approved and authorized. In the last-cited proceeding, the court noted the contention that the disputed rates were not in fact "joint rates," since Consolidated Freightways, Inc., was required to point to its motor carrier rights to justify the substituted service arrangements proposed. That the court did not fully accept this view is evident from the following language taken from pages 562 and 563 of its decision:

The conflicting contentions can best be dealt with in the light of the language of the service which plaintiff proposed to render, the pertinent parts of which read as follows:

> "*Application of this Tariff:*
>
> "Unless the shipper directs that rail service shall not be performed, the motor carriers parties to this tariff may, at their option, substitute rail service between the points and via the rail carriers shown herein, *for their actually available services via highways for which such motor carriers have lawful operating rights* as common carriers via motor vehicle." [Emphasis supplied by the court.]

This language clearly indicates that plaintiff, when filing these rates, operated under the assumption that the proposed service was to function between points which it could service under lawful motor carrier operating rights. The fact that plaintiff expressly reserved for itself the option to perform the proposed service by motor carrier is further evidence that it deemed the proposed tariff to be an integral part of its motor carrier operations. Under these circumstances a determination of whether

the proposed service is to be labeled railway or motor carrier service is superfluous since plaintiff must be found to have designated it as the latter. It appears that the legality of the proposed substituted trailer-on-flatcar service depends on the legality of the motor carrier service which plaintiff offers to provide at its option. Consolidated's contention in the instant case that the trailer-on-flatcar service should be dealt with as distinct from its operating authority as [a] motor carrier is thus without merit.

There thus came into existence two fundamental types of coordinated motor-rail piggyback services and arrangements, both of which have been sanctioned by this Commission as lawful joint-rate and through-route arrangements. One form of operation—which has come to be known as plan I TOFC service—provides for the "substitution" of rail for motor service at rates which are the equivalent of corresponding all-highway rates published by the participating motor carrier. A motor Substituted Freight Service Directory provides reference to the concurrence of the rail carrier and the points between which the substitution may be made, and such information is incorporated into the governing rate tariff by an appropriate tariff rule which preserves the shipper's right to direct that such substitution not take place. The other type of coordinated motor-rail TOFC operations has come to be known as plan V TOFC service. As here pertinent, under plan V, rail-motor, motor-rail, or motor-rail-motor services are provided under joint rates which are generally published in a tariff separate and distinct from other tariffs maintained by the participating regulated common carriers and which are applicable only over the through route or routes. There is no question but that a motor common carrier may, under an appropriate plan V tariff, interchange traffic with the participating railroad at an authorized service point short of the full length of its authorized operations, and later receive such traffic back again for movement between other of its authorized points of service. In such an operation, of course, the rail car-

rier's physical participation in the through movement is as a "bridge" carrier and is substantially similar to that present in a plan I operation.

None of the parties herein challenge the lawfulness or propriety of plan V TOFC service. And predicated upon the foregoing Commission precedents as well as their own independent analysis of the relevant statutory provisions in the light of the contrary arguments of the regulated freight forwarders, Southern Railway System, and Helm's Express, Inc., the examiners concluded that plan I TOFC service is a lawful through-route and joint-rate arrangement specifically authorized by section 216(c) of the act; that the arguments of those attacking the legality of plan I operations are without merit; and that the continuation of plan I service is in the public interest and in harmony with the national transportation policy. With this position we agree.

In the *New Haven* case, *supra*, it was found, properly we think, that "trailer-on-flatcar transportation is in fact transportation by railroad," and that "this is so whether the trailers are owned or operated by railroads, shippers, or motor common carriers." We have also noted previously that a railroad lawfully may receive as compensation for its services only such rates and charges as are published in tariffs open to the shipping public generally or such reasonable divisions of joint rates as may be negotiated with the other carriers participating in the through service. See, for example, *Louisiana, A. & T. Ry. Co. Operation*, 170 I.C.C. 602. Since the rail portion of plan I service is not as such available for use by the general shipping public, it necessarily follows that such an operation, if it is to be sustained at all, must be sustained as a joint-rate arrangement under section 216(c), the only statutory provision authorizing the maintenance of through routes and joint rates between a railroad and a motor carrier. Stated somewhat differently, we think the ex-

aminers were correct in concluding that motor and rail carriers may partcipate in plan I TOFC service only as connecting carriers under through-route and joint-rate arrangements specifically authorized by section 216(c). This, as seen, is not because of any specific legal restriction upon motor carriers as such, but because of the statutory limitations on the manner in which a railroad may be compensated for its service.

Whether plan I TOFC service qualifies as a lawful joint rate under section 216(c) of the act is, as has been noted, the subject of considerable controversy among certain of the parties hereto. Thus, on exceptions the regulated freight forwarding companies and Southern Railway System renew their contentions made throughout this proceeding that plan I TOFC service is unlawful under the act. Their arguments in this respect are stated in full in the examiners' report, have been considered by us, and need not be repeated here. We shall instead confine our attention to the more essential aspects of this dispute.

Section 216(c) of the act reads as follows:

Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

This section does not denote the particular type of through routes and joint rates therein authorized to be established,

and nowhere else in the act are the terms "through routes" and "joint rates" specifically defined. The freight forwarders, however, assert that section 216(c) must be read in conjunction with the provisions of section 217(a) of the act, and that when this is done it is clear that a lawful through-route and joint-rate arrangement must represent a joint undertaking by two or more connecting carriers to transport property from a point on the line of the originating carrier to a point on the line of the delivering carrier. We do not so read section 217(a).

That section, as here material, provides the following:

> Every common carrier by motor vehicle shall file with the Commission * * * tariffs showing all the rates * * * and charges for transportation, and all services in connection therewith, of * * * property in interstate or foreign commerce between points on its own route and *between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad * * * when a through route and joint rate shall have been established.* [Emphasis supplied.]

We think it clear that the italicized portion of section 217(a) quoted above was not intended to be, and is not, a limitation upon the general permission which section 216(c) grants to motor common carriers to establish through routes and joint rates with rail carriers. Instead, such language is a necessary adjunct to the statutory requirement that motor common carriers shall file tariffs showing their rates and charges between points on their own routes, and but for the inclusion of that language in the statute, tariffs providing for joint rates and through routes would not be required to be filed. And because it is not lawful for a motor common carrier individually to publish rates to or from points it is not authorized to serve, tariffs containing such rates must be predicated upon previously established through routes and joint rates. To put it an-

other way, section 217(a), as we read it, provides that a motor common carrier shall file tariffs applicable to or from points it itself is not authorized to serve only when a through route and joint rate shall have been established; but the converse—that a through route and joint rate may be established only to or from points the motor carrier is not authorized to serve—is simply not true. We conclude, as was concluded in the *Traffic in East and Midwest* case, *supra*, that the permission granted motor common carriers by section 216(c) of the act to establish through routes and joint rates is not limited by anything contained in that section or in section 217(a), except that the through routes and joint rates must be reasonable. See also *Lubbock-El Paso Motor Frt., Inc., Com. Car. Application*, 27 M.C.C. 585, *Lubbock-El Paso Motor Freight, Inc., Extension*, 29 M.C.C. 281, and *Daniels* v. *Rose*, 43 M.C.C. 726.

The freight forwarders further argue that plan I services do not comply with the requirements of a through joint rate in that (1) the rates charged for such service do not apply on a given shipment, as such, throughout the entire movement, because the contract of carriage between the motor carrier and the shipper calls for the transportation of less-than-truckload shipments, whereas the arrangement between the motor carrier and the railroad covers the transportation of freight in carloads only, consisting of loaded or empty trailers; and (2) the rates charged for plan I service are not divided on a just and reasonable basis between the carriers participating therein. These arguments, we think, lack merit. Under a plan I arrangement, the motor carrier and railroad do, in fact, agree to transport, at a single through rate, any given shipment of freight falling within the scope of their tariff publication, and no rates are charged or tariffs published with respect to such plan I operations on any other basis. The arrangement between the railroad and the motor carriers, under which the railroad is to be compensated for its portion of

the through service, is thus a division agreement specifically authorized by section 216(c), and not a separate rate or charge. With respect to the second argument of the forwarders, section 216(c) requires only that the carriers, parties to the joint rates, establish "just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers". The question of what constitutes just, reasonable, and equitable divisions necessarily involves many considerations, both factual and legal, but plainly the maintenance of divisions computed on exactly the same basis as is the overall joint rate, to the exclusion of all other factors and considerations, is not required by the statute and may, in fact, be in violation thereof. The argument of the freight forwarders that "It is highly probable that in some instances the 'division' is greater than the whole," is not supported by the record. For these reasons, we reject the considered arguments of the freight forwarders.

Yet another argument raised by the freight forwarders is that plan I service is not a lawful joint-rate arrangement because the railroad assertedly is not a party to the bill of lading given to the shipper by the motor carrier; that is, that before there can be a through route and joint rate, all participating carriers must be bound by, and jointly and severally responsible under, the original bill of lading. This argument, however, begs the ultimate question as to the status of the carriers participating in plan I service, and, in our view, assumes matters which are simply not true. If, as we hold, plan I operations are, in fact, valid through-route and joint-rate arrangements between connecting carriers, it necessarily follows that the respective liabilities of the participating carriers are to be governed by sections 20(11) and 20(12) of the act. Compare *Pacific Purchasing Co.* v. *Chicago & N. W. Ry. Co.*, 12 I.C.C. 549, 552, and *Savage Application*, 265 I.C.C. 157, 167. Under

section 20(11), the initial carrier is liable to the shipper for all damage or loss, whether caused by it or not, on the theory that in accepting the shipment under the through joint rate it becomes a principal and all its connecting carriers agents for the transportation of the goods; and section 20(12) provides a "right over" in order to insure that the ultimate burden falls upon the carrier responsible for the loss. Nor can we accept as seriously made the contentions of the freight forwarders to the effect that a railroad cannot assume responsibility to an unknown shipper. Prior to enactment of part IV of the act, shippers by freight forwarder had for many years been allowed to sue the underlying carriers for loss or damage occasioned by the latter. Such actions were based upon the fundamental theory that the shipper was the undisclosed principal of its agent, the forwarder, in the latter's contract with the carrier. See *Chicago, M. St. P. & Pac. R. Co.* v. *Acme Fast Freight,* 336 U. S. 465 (1948) at page 488 (footnote 27). The contrary contention of the freight forwarders is without foundation.

At this point, it might be well to mention that our conclusion with respect to the applicability of sections 20(11) and 20(12) in determining the liability of the carriers participating in plan I TOFC service is not new and appears to have been generally accepted by the industry for many years. This is indicated not only by the statements and representations filed by those carriers favoring the continuation of plan I service, but also by an exhibit appended to the exceptions of Clipper Carloading Company, which contains representative items from a division sheet of the Pennsylvania Railroad Company, which are said to limit the liability of the railroad. Even a cursory examination of these items, however, makes it plain that they do not limit the rail carrier's liability to the public, but instead merely constitute indemnification agreements which govern the allocation of responsibility in disputes between

the participating carriers. If the railroad were to have no liability to the shipper in a plan I arrangement, or if it were to believe that it had no such liability, there would be no reason for the inclusion of these provisions in the division sheet.

By far the argument most strenuously urged by the freight forwarding companies is that plan I TOFC operations allow motor carriers to depart from their statutory role as highway carriers and to function in a manner reserved for freight forwarders. The equivalent of plan I service was first approved in 1936 in *Motor-Rail-Motor Traffic in East and Midwest, supra,* and the directory form of tariff publication received Commission sanction in 1939 in the *Substituted Freight Service* case, *supra,* approximately 6 and 3 years, respectively, prior to the advent of Federal regulation of the freight forwarder industry. What the forwarders here seek to eliminate, then, is a coordinated service, the lawfulness of which had been confirmed prior to congressional recognition of their own activities. There is nothing in part IV of the act, under which freight forwarders are regulated, or in its legislative history which suggests that Congress intended to curtail existing coordinated transportation services. Rather, part IV, in defining those services and persons subject to its scope, specifically excludes from its purview persons who, as carriers subject to parts I, II, or III of the act, hold themselves out to the general public as common carriers to transport, or to provide transportation, of property for compensation.

In their final attack upon plan I operations generally, the freight forwarders maintain, as they have on brief and in their petition for separation of the issues filed April 2, 1963, and denied by the examiners in their report, that the record herein does not contain sufficient evidence to support the lawfulness of plan I service as practiced, even if the plan should be found to be lawful per se. They argue, in

effect, that, unlike the Commission-approved plans II, III, and IV which involved exhaustive hearings at which were explored all questions relating to the lawfulness of such plans, including the justness and reasonableness of the rates and their economic and competitive effect, proceedings involving plan I operations have dealt solely with an exploration of various legal theories concerning the statutory basis for the plan; that we should not promulgate rules to perpetuate a service about which we lack any precise knowledge; that such evidence as the present record contains about plan I operations is incomplete and has not been tested by cross-examination of witnesses; that generally plan I charges are materially lower than plan III charges, and if the latter are just and reasonable, the plan I charges become suspect; that they have not been afforded a full and fair hearing with respect to the issues involved; and that, therefore, their petition for separation of the issues and for oral hearing regarding plan I TOFC service, as practiced, should be granted. We find these arguments to be without merit and, accordingly, affirm the examiners' denial of the freight forwarders' petition. The following quotation, taken from page 686 of the *Substituted Freight Service* case, *supra*, best sums up our views in this regard:

* * * The issuance of a report setting forth our interpretation of the law, after briefs and oral argument, is consistent with our practice in a number of important proceedings [citations omitted]. The principal issue in the instant proceeding is one of law * * *. On this issue we think the procedure outlined above has constituted a full hearing within the meaning of the act, all parties having been given full opportunity to be heard as to the step proposed to be taken. * * * It may also be that * * * mixed questions of law and fact [may] arise whether the practices in connection therewith are reasonable, nondiscriminatory, or otherwise lawful, which will require oral hearings for the taking of testimony. If so, requests for such hearings will receive proper consideration. In the meantime, at this stage of the

proceeding, such oral hearings would not be in the interest of justice nor serve any useful purpose.

The views so stated apply with equal force to the present proceeding, and we see little that can be added thereto. It should be noted, however, that we have, from the outset, said that the level or reasonableness of TOFC rates was not in issue in this case. We adhere to that position.

The freight forwarders have raised additional arguments which call for brief comment. One which is also urged by the Local and Short Haul Carriers National Conference involves the legality of plan I TOFC service wherein rail service is provided or substituted by a motor common carrier for the entire line-haul movement, and will be taken up at a later point in this report. The forwarders also argue that we have been inconsistent in dealing with plan I service in that we have termed it "in legal effect" a joint service, but have regulated it as if it entailed operation over an alternate route or a deviation route within the meaning of section 208(b) of the act. This view appears to be the result of a misconception of the rationale underlying the imposition of so-called circuity limitations, to be discussed fully below, upon a regulated motor carrier's participation in TOFC service.

In summary, we conclude, as did the examiners and the Commission decisions prior to the *NATA* case, that when a motor common carrier participates in plan I TOFC operations, paying the railroad compensation other than that set forth in the railroad's regularly published tariff, the motor carrier's status is that of a connecting carrier in a joint service provided voluntarily by the participating rail and motor common carriers; and that plan I TOFC operations thus constitute a valid through-route and joint-rate arrangement within the contemplation of section 216(c) of the act. A fact which we have referred to before in this report is the general lack of opposition to the provision of a through joint intermodal TOFC service under

what are known generally as plan V tariffs and arrangements. Plan I and plan V, however, share in common the important features of a through-route and joint-rate arrangement: both entail the voluntary cooperation and agreement of the participating carriers; both involve the payment by the shipper of a single through rate which is divided among the carrier participants on a negotiated basis; and both may involve the rendition of joint service between points the motor carrier is authorized to serve in all-highway service. The fundamental distinction between plan I and plan V operations, as we see it, is that rail and motor carriers serving different areas may combine their service in plan V operations to perform a through service between origin and destination. Another difference is that the tariff rules covering the rendition of plan I service specifically embrace a holding out by the motor carrier to perform an all-highway service at the election of the shipper, whereas the rates provided in plan V joint tariffs are applicable only over the joint intermodal route. In substance, then, plan I merely embraces a simplified form of tariff publication, which combines a joint motor-rail-motor rate applicable over the intermodal route with an all-motor rate of the same level which is applicable over the alternate all-highway routing. And though this form of tariff publication and intermodal operation necessarily raises questions as to the motor carrier's underlying motor-carrier operating authority, for that is a service alternatively held out, we do not think any real significance may logically be accorded this feature of plan I TOFC operations from the standpoint of the basic legality of such service under the statute.

The net effect of the above conclusions is, as was recognized by the examiner, to allow only motor common carriers subject to part II of the act to participate in plan I service arrangements and to peclude such participation by contract carriers as well as by unregulated carriers

generally. See, for example, *Holmes Contract Carrier Application*, 8 M.C.C. 391; *Reed Contract Carrier Application*, 24 M.C.C. 459; and *Acme Fast Freight, Inc., Common Carrier Application*, 2 M.C.C. 415 and 8 M.C.C. 211; *aff'd. Acme Fast Freight, Inc.* v. *United States*, 30 F. Supp. 968, *aff'd. per curiam*, 309 U. S. 638. Our conclusions, however, with respect to the availability of open-tariff rail service to everyone on an equal basis will, we think, ease any burdens which otherwise might be thought to result and make further discussion of this matter unnecessary. We, of course, recognize that the conclusions expressed here are at variance with some of the reasoning in the *NATA* case. However, as previously noted, the TOFC practices of motor carriers of automobiles—whose operating authorities are limited specially to initial or secondary movements—have been separated from the other issues here present because of the unique problems involved and have been set for further proceedings.

The Bureau of Inquiry and Compliance and the freight forwarders ask that a rule be adopted requiring carriers participating in joint intermodal TOFC service to file with the Commission the division sheets or contracts containing the arrangements under which revenues for plan I or plan V TOFC movements are shared. Sections 6(5),[5] 220(a), and 313(b) of the act give us the authority to require the filing by common carriers subject to parts I, II, and III respectively, of all contracts with other common carriers related to regulated traffic. We have hitherto called for the filing of such contracts in only a few special instances, and we do not think that the present record offers any basis for departing from this general policy. This Commission has recently made concerted efforts to reduce and condense the amount of necessary information which must be filed with us in an attempt to relieve the carriers subject to our

[5] As implemented by our general order of August 19, 1952, 49 C.F.R. 4.1.

regulation, as well as our own staff, of heavy administrative burdens. We do not propose to depart from this policy in the absence of convincing reasons. There has been no showing here that the division arrangements established by railroads and other common carriers engaging in joint intermodal TOFC service have been in any way unlawful or unduly prejudicial to any other carrier. Should we be informed in the future that the unpublished divisions are being used as a shield for improper activities by any carrier, it will then be time enough to make the determination whether a general rule is needed to correct the situation. In the absence of any such evidence, no such rule will be adopted.

Much of what has been said in this discussion of joint intermodal TOFC service has been stated in an interpretive vein and is not susceptible to statement in the form of general rules and regulations. To the extent that rules are necessary and desirable, however, we think that those set forth below, as supplemented later in this report, will suffice. Such rules are not intended, nor do we believe them, to modify in any substantive manner the fundamental requirements of the statute. As an example, the use of permissive terms in speaking of joint water-rail service in rule 4(a) does not alter the mandatory requirements of section 1(4) of the act that common carriers by railroad subject to part I *shall* establish reasonable through routes with common carriers by water subject to part III of the act. The following rules governing joint intermodal TOFC transportation will be adopted:

4 *Joint intermodal TOFC service.*—

(*a*) Except as otherwise may be prohibited by these rules, any rail carrier or carriers subject to part I of the act may enter into through-route and joint-rate arrangements with any motor common carrier subject to part II of the act or any water common carrier subject to part III

of the act, wherein TOFC service is to be provided either in lieu of, or in addition to, the authorized all-highway or all-water service of such motor or water common carrier.

(*b*) Motor or water common carriers may participate in joint intermodal TOFC service in lieu of their authorized all-highway or all-water service only if their tariff publications give notice that such service may be provided at their option, but that the right is reserved to the user of their services to direct that in any particular instance such TOFC service not be provided.

(*c*) Tariffs embracing joint intermodal TOFC rates or charges, including Substituted Service Directories, if used, shall set forth the service covered by the published rates or charges; the points of interchange between modes of transportation; and the names of the carriers participating therein.

PARTIALLY EXEMPT TRANSPORTATION

Both the proposed rules and those of the examiners contain provisions which would have the effect of prohibiting the transportation in joint intermodal TOFC service of commodities the transportation of which is exempt from economic regulation for a part of the movement, and of permitting the transportation of such commodities only in open-tariff TOFC service. The examiners' recommended rules 7 and 18, which correspond closely to proposed rules B-2 and C-7, respectively, would provide:

7. Tariffs setting forth rates or charges for joint intermodal TOFC transportation may be published only by rail, motor, or water common carriers, or their agents, on commodities the transportation of which is subject to economic regulation throughout their entire movement, and shall show appropriate concurrences of all carriers participating in the movement.

18. The handling by a railroad of a motor or water carrier's trailer, loaded with commodities the transportation of which is not subject to economic regulation under the Interstate Commerce Act, is permissible only under all-rail TOFC tariffs.

The assumption underlying these rules is that there is no way, under the provisions of the Interstate Commerce Act, in which a carrier can publish a joint through rate covering transportation not wholly subject to the Commission's economic regulation. Several parties, particularly the Eastern and Western Railroads, the Southern Railway System, and the Florida Shippers, challenge this assumption, arguing that tariffs can be filed covering the movement of so-called exempt commodities, that once they have been filed the Commission's jurisdiction "attaches," and that such tariffs can become the basis for a plan I type of TOFC service.

The parties taking this position cite no supporting statutory authority, and they also seem to overlook the obvious fact that the Commission's jurisdiction, even if it did "attach" in some unexplained way, would be of no effect in the absence of statutory power to enforce compliance with the stated charges. Should a motor carrier file with the Commission a tariff which by its terms might appear to cover exempt transportation (for example, a rate on "foodstuffs," a generic description which would include many unprocessed agricultural commodities), it would nevertheless not be bound to charge the published rate, and the Commission would have no authority to compel it to do so. The corollary to this proposition, which is equally true, is that with regard to transportation for which the Commission cannot compel compliance with tariff publications, a carrier cannot publish with the Commission a tariff which can be recognized by it in any way. The upshot of the matter is simply that there is no way in which a motor or water carrier can publish an effective rate covering transportation not subject to the Commission's economic regulation. It must follow that an attempted joint rate covering such transportation is equally abortive, for where one party to an alleged through rate is under no obligation to collect the stated charges, the rate itself can be of no force and effect.

Appendix B.

The Commission's decisions on this subject have been consistent. *Cosmopolitan Shipping Co.* v. *Hamburg-Amer. Packet Co.*, 13 I.C.C. 266, 281; *Tariffs Embracing Motor-Truck or Wagon Transfer Service*, 91 I.C.C. 539, 548; and *Motor Bus and Motor Truck Operation*, 140 I.C.C. 685, 729. *Drayage and Unloading at Jefferson City, Mo.*, 206 I.C.C. 436, which arose prior to Federal regulation of interstate motor carriage, involved an attempt by rail carriers to enter into joint rates with motor carriers. The Commission stated, at pages 440-41:

> While there is no express prohibition in the act against the publication of rates in connection with a common carrier not subject to the act, we have consistently held that the line must be drawn between those carriers whose rates and practices we can control and those which we cannot control; and upon this line of reasoning it has been our ruling that joint rates cannot be made between carriers subject to the act and those not subject to the act.

Later, after the passage of part II of the act brought interstate motor carriers within the scope of Federal regulation, we said in *Interchange of Traffic at Point of Origin*, 46 M.C.C. 623, 626:

> It is apparent that the absence of power to regulate all carriers parties to joint rates would, in effect, render void our power to regulate such joint rates. * * * Specifically, motor common carriers of property are authorized to establish joint rates with the several classes of carriers designated in section 216(c) of the act only when the participating carriers' rates and practices are subject to our control.

The principal cases relied upon by the parties opposing recommended rules 7 and 18 are not controlling here. *Dixie Carriers* v. *United States*, 351 U. S. 56, and *Refrigerated S. S. Line, Inc., Rates and Advance Charges*, 279 I.C.C. 567, deal not with joint rates but with proportional rates.

Carstens Packing Co. v. Great Northern Ry. Co., 264 I.C.C. 164, involves the publication of a joint through rate on traffic moving between a point in the United States and a point in Canada. Part I of the act permits the publication of joint rates in such a situation. On the other hand, joint through rates between rail and motor common carriers may be established only by virtue of section 216(c) of the act, and this section contains no provision for the participation in such rates by carriers not subject to the Commission's economic jurisdiction. For us to hold otherwise and to permit the publication of rates for the performance of exempt transportation would be to contravene the intent of Congress to exclude such transportation from the rate provisions of the act.

Although the publication of joint intermodal TOFC rates for the movement of commodities the motor transportation of which is exempt from economic regulation is not possible, the transportation of such commodities in piggyback service may still be accomplished by a motor carrier through the use of open-tariff rates where they are made available by the railroads. It would also be possible for a rail carrier, even though it may not participate in a joint through rate, to establish a proportional rate on traffic moving in part by a nonregulated motor carrier. See the *Motor Bus and Motor Truck Operation* and the *Refrigerated S. S. Line* cases, *supra*.

We shall adopt the following rule to reflect the conclusions reached in the foregoing discussion:

4(*f*) Tariffs setting forth through rates or charges for joint intermodal TOFC transportation may be published only with respect to commodities the transportation of which is subject to economic regulation throughout the entire movement provided for in such tariffs.

LIMITATIONS ON TOFC SERVICE

This proceeding also presents a number of questions relating to the underlying operating authorities of motor car-

rier participants in or users of TOFC services generally. Such questions, briefly stated, concern the nature and scope of the operating rights which a regulated motor carrier must hold in order to participate in joint intermodal TOFC service or to utilize the open-tariff TOFC services proffered by the rail carriers; the duty of a railroad to determine a connecting carrier's authority; and the effect which a motor carrier's participation in or utilization of TOFC services may have upon its underlying operating authority. These issues will next be considered.

Interchange at other than authorized service points.—Proposed rule B-3, the adoption of which was recommended by the examiners (as their rule 11), provides that carriers participating in joint intermodal TOFC service shall interchange traffic only at a common point of service. The Eastern Railroads are the only parties which specifically except to the proposed rule and they contend that such a rule as applied to substituted joint TOFC service is unnecessary. They reason that the fundamental purpose of any rule requiring that both parties to a joint arrangement be authorized to serve an interchange point is to avoid the creation of new and unauthorized competitive service, and that this objective is as well achieved in the case of substituted joint service arrangements simply by requiring the motor carrier to hold appropriate authority for the entire movement. It is our opinion, however, that the facts of record in this proceeding do not warrant any departure from the long-established practice of this Commission prohibiting a motor carrier from interchanging traffic at points other than its authorized service points. *Gilbert Carrier Corp. Extension-Kearny, N. J.*, 72 M.C.C. 204. The following rule, will, therefore, be adopted:

4(*d*) Carriers participating in joint intermodal TOFC service shall interchange traffic only at a common point of service.

Appendix B.

Where motor or water common or contract carriers use open-tariff TOFC service in the performance of authorized service, they do not, in tendering or receiving freight to or from a rail carrier, participate in joint rates and through routes, and no interchange of traffic is involved. However, if such operations are to be effectively controlled, particularly for the purposes of the circuity provisions discussed and adopted below, we believe that these carriers should be limited to the use of TOFC service only between points they are authorized to serve. The following rule to effect this purpose will be adopted:

3(e) Motor and water common and contract carriers utilizing open-tariff TOFC service in the performance of authorized transportation shall tender traffic to and receive traffic from rail carriers only at points which the motor and water carriers are authorized to serve.

Interchange within terminal areas.—Rule B-7, as proposed at the prehearing conference herein, would allow tariffs embracing joint intermodal TOFC rates or charges to provide for TOFC service for the entire line-haul movement. Under this rule, rail TOFC service could be substituted for the over-the-highway service of the participating motor common carrier with the latter performing no line-haul motor service but merely pickup, delivery, and transfer services within terminal areas at the termini of the intercity movement. The substance of this proposed rule, limited to plan I TOFC service, was adopted by the examiners as their recommended rule 10.

Exceptions to this rule were filed by the regulated freight forwarders, the Local and Short Haul Carriers National Conference, and by the Southern Railway System. In general, the forwarders contend that joint rates may not be established between carriers who perform only terminal area services and those who perform line-haul service, citing *Interchange of Traffic at Point of Origin*,

46 M.C.C. 623; *Palisano Common Carrier Application*, 30 M.C.C. 591, 41 M.C.C. 229; *Substituted Freight Service*, 232 I.C.C. 683; *Advance Transp. Co.* v. *Allard*, 305 I.C.C. 751; and *Rubber Articles, Philadelphia to Ill., Ky., Mich. & Mo.*, 319 I.C.C. 632. They further say that if motor carriers are permitted to substitute rail TOFC services for the entire line-haul operation, they would be unlawfully augmenting their facilities and services by the use of the facilities and services of the railroads, and would be performing no motor service at all, having completely abandoned the highways, in contravention of their certificates and the certificate requirements of the act. The Southern Railway System argues that use of plan I TOFC service through the Substituted Service Directory device should be prohibited, but that a motor common carrier having appropriate authority should be allowed to join with a railroad in publishing plan V TOFC joint rates under which the railroad would perform a part or even all of the line-haul service between points which the motor carrier is authorized to serve. The Local and Short Haul Carriers National Conference contends that an essential feature of joint-line service is that each transportation mode will perform some semblance of transportation service as contemplated by parts I and II of the act, and that where the motor carrier performs merely terminal services and substitutes line-haul rail service for its over-the-highway service, it is not performing any operation under the terms of its certificate. If we, however, adopt the position that plan I TOFC service is a joint service between two modes of carriage under a joint-rate arrangement authorized under section 216(c) of the act, and further allow rail TOFC service to be provided for the entire line-haul movement, the conference believes that motor carriers now operating in a similar fashion pursuant to the partial exemptions provided by sections 202(c) and 203(b)(8) also should be subjected to economic regulation.

Appendix B.

At the outset, it should be noted that nothing in the statute specifically prohibits the establishment of joint-rate arrangements between certificated motor common carriers performing terminal operations and common carriers by railroad providing the entire line-haul service. As was stated by the Commission in *Motor-Rail-Motor Traffic in East and Midwest*, 219 I.C.C. 245, at page 273:

Nor can we accept the contention that because the haul which a motor common carrier might receive on some traffic would be short, or terminal in character, that it may not participate in such a joint rail-motor route. On this point we see no reason for departing from the following conclusion reached in *Trucking L.C.L. Freight in Lieu of Rail Service*, 185 I.C.C. 71, 73:

"And while terminal carriers may publish switching charges, and act as the agents of connecting road-haul carriers when the latter assume and pay those charges, there is nothing in the act which prohibits the terminal carriers from participation in their own right in joint through rates as they have elected to do here."

Other than for the partial exemption embraced in section 202(c) (2), we have been referred to, and we know of, no provisions of the statute which in any manner could be said to require a result different from that reached in the cited proceeding. Accordingly, it is necessary that we examine section 202(c)(2) in some detail, particularly in the light of those cases cited by the parties which interpret that section.

Section 202(c)(2), as here relevant, provides that the provisions of part II (except those in section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment) shall not apply—

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express

company subject to part I, a motor carrier subject to this part, a water carrier subject to part III, or a freight forwarder subject to part IV, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental.

The manner in which this provision, so far as material to the present controversy, has been interpreted and applied in the past may be stated in the following form: (1) motor carrier pickup and delivery service within the terminal area of a line-haul carrier, rail or motor, will be considered as being performed "for" the line-haul carrier regardless of the character of the contractual arrangements between the terminal and line-haul carriers, so as to bring such operations within the exemption provisions of section 202(c)(2) of the Act; (2) our regulatory jurisdiction, therefore, does not extend to the rates and charges of motor carriers engaged in the performance of collection, delivery, or transfer service within such terminal areas; and (3) in accordance with the general principle that joint rates cannot be established between carriers whose rates and practices are subject to regulation and those whose rates and practices are not so subject, it follows that joint rates may not lawfully be maintained by the terminal area motor carrier and the line-haul carrier.

To put it another way, the conclusion that a motor carrier performing only terminal area service may not lawfully join in through-route and joint-rate arrangements with a line-haul rail carrier in the circumstances here present (a conclusion reached most recently in the *Rubber Articles* case, *supra*) rests upon two interrelated syllogisms. The first such syllogism may be stated as follows: section 202(c)(2) exempts from direct regulation under part II, all

motor transfer, collection, and delivery service performed "for" a common carrier by railroad subject to part I; such terminal service will be deemed to be performed "for" the line-haul rail carrier regardless of the form of contractual arrangements involved and notwithstanding an attempt to establish bona fide joint rates and through routes between such line-haul rail carrier and a motor carrier performing only pickup, delivery, and transfer service within the rail terminal area; and, consequently, a motor carrier providing only terminal service in connection with the line-haul operations of a railroad subject to part I is exempt from direct regulation under part II. This consequence then forms the minor premise in a second syllogism, which has as its major premise the proposition that joint rates may not lawfully be maintained between carriers whose rates and practices are subject to our control and those whose rates and practices are not so subject, in order to arrive at the ultimate conclusion stated above. For the reasons hereinafter stated, we believe that this theory is inapplicable to joint intermodal TOFC service provided in lieu of, rather than as an extension to, a motor carrier's authorized all-highway service.

The quoted provisions of section 202(c)(2) were first construed in the *Palisano* case, *supra,* which was decided September 18, 1941, exactly 1 year following their enactment. There, division 5 found that the applicants' motor carrier pickup and delivery service within the terminal areas of line-haul motor carriers, under joint rates to which the applicants were parties, or under combination rates, came within the partial exemption of section 202(c)(2), and that, therefore, no certificate or permit was required for its performance. In so finding, the division stated at 30 M.C.C. 593, *et seq.*:

There is, however, some question worthy of comment as to whether services performed by a carrier as an independent carrier operating under duly established through routes and joint rates or performing through service under

separately established rates of the two carriers can be deemed to be performed "for" the connecting carrier. If such services are not "for" the line-haul carrier, they lie outside the exemption.

We consider that the word "for" imports the idea of something done in furtherance of the operations of the connecting carrier and that the services in question which result in placing shipments at the convenient disposal of the line-haul carrier must be regarded as performed for such carrier in any reasonable interpretation of the word "for." * * * To construe the word as applicable to service performed under one type of arrangement with a line-haul carrier and to deny the application of the exemption to precisely the same service performed under a different mode or style of agreement seems to us to constitute a sacrifice of substance to form. Essentially the situation in every such case is that the line-haul carrier, having the right to perform this local service, elects rather to have another carrier do it for him.

Plainly, this reasoning cannot be said to apply to those instances wherein joint intermodal TOFC service is provided in lieu of a motor common carrier's authorized all-highway service. In such situations, the motor common carrier possesses the requisite authority to perform the entire transportation service itself, and it is only at the option of such motor carrier (absent a negative direction by the shipper) that the traffic moves in joint intermodal TOFC service. And at the time the motor carrier picks up or receives the shipment from the consignor, it may not be known to the shipper (again absent such a negative direction) whether the shipment will move in the all-highway service of the motor carrier or in the joint intermodal TOFC service which the motor carrier, in conjunction with the line-haul railroad, undertakes to provide at its option. It cannot logically be doubted, therefore, that whenever joint intermodal TOFC service is to be provided in lieu of an authorized all-motor operation, it is the motor carrier, and not the line-haul railroad, which is the primary carrier and which gives the terminal operations color under the law. Or, stated somewhat differently,

it seems clear that in these circumstances the collection and delivery services performed by a motor carrier within terminal areas are part and parcel of that motor caarrier's authorized line-haul highway service and are to be regarded and regulated as such. Cf. *Pontin Lighterage & Transp. Corp. Com. and Contr. Car. App.*, 250 I.C.C. 441. All things considered, it is our opinion that these motor carrier terminal area operations, in the circumstances here considered, cannot reasonably be considered as being performed "for" the line-haul rail carrier within the meaning of section 202(c)(2) of the act, and that, therefore, such operations are subject to full economic regulation by this Commission.[4] In view of this conclusion, it follows that section 202(c)(2) is no bar to the establishment of joint rates and through routes between a common carrier by railroad performing the line-haul service and a properly authorized common carrier by motor vehicle providing only terminal area pickup and delivery services and substituting, in effect, the line-haul rail service for its own authorized over-the-road operations.

All of the proceeding which are cited by the parties (which cases have been referred to earlier herein) as reaching a different conclusion from that expressed above are, we believe, bottomed upon the single basic factual flaw which formed the basis for the decision in the *Palisano* case.[5] As such, we do not deem it necessary to discuss

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[4] No separate authority is required for this operation, however, for the right to provide terminal services is implied in the line-haul motor carrier authority. *Commercial Zones and Terminal Areas*, 54 M.C.C. 21, 108 and 109.

[5] While we believe that this conclusion adequately settles the matter here in dispute, we think it appropriate to note our belief that such decisions also suffer from a general failure to recognize that the provisions of section 202(c) only provide a partial exemption from "direct" regulation under part II and that such terminal area operations, including the rates and charges therefor, are subject to indirect regulation through the line-haul service to which they are incidental. Accordingly, application to this situation of the general principle prohibiting joint rates between regulated and nonregulated operations, as noted above, is at best questionable.

each of those cases in detail herein, and we merely note that to the extent such decisions may differ from the views here expressed, they will not in the future be followed. To give effect to our conclusions herein, the following rule, which will be applicaable to joint intermodal TOFC service provided in lieu of a motor or water carrier's authorized all-highway or all-water service, will be adopted:

4(*e*) Where joint intermodal TOFC service is to be performed in lieu of a motor or water carrier's authorized all-highway or all-water route, tariffs embracing rates or charges covering such service may provide for the performance of TOFC service for the entire line-haul movement.

Circuity limitations.—A problem which has confronted this Commission for a number of years is that presented when a motor carrier authorized to operate between two given points over a circuitous route attempts to use, in lieu of its all-highway service, the TOFC service of a railroad whose lines provide a more direct routing between the termini. This issue arises because motor carriers, whether operating over regular or irregular routes, are ordinarily limited as to the points they can serve and the manner in which they can operate between them. A regular-route motor carrier is restricted to operation over certain highways, and as its business expands and its operating authority increases on a piecemeal basis, it is likely to find itself with authorized routes between certain points in its system which are not the most direct available. An irregular-route motor carrier is apt to find itself engaged in circuitous operations only if it combines two or more grants of authority at common service points in order to provide through transportation. To allow carriers to ignore the routing and gateway limitations in their operating authorities and to provide service between any points they serve, no matter how indirect their authorized operations, would be to allow them to provide totally new

services for which no public need had been established, and would largely negate the certificate and permit requirements of the act. *Motor Carriers of Property—Routes and Service,* 88 M.C.C. 415, 423-25. It is obvious that this result would obtain from the indiscriminate substitution of direct TOFC service for indirect all-motor service.

In *Substituted Rail Service by Red Ball Transfer Co.,* 52 M.C.C. 75 and 303 I.C.C. 421, Red Ball, a motor common carrier, had filed schedules providing for the substitution of the TOFC Service of the Chicago Great Western Railway between Chicago and Kansas City. Although the rail route was somewhat shorter than Red Ball's authorized highway route between these points, it was found that using TOFC service would not enable Red Ball to provide an improved service and would not affect its competitive situation vis-a-vis motor carriers authorized to operate directly between Chicago and Kansas City. In *Gordons Transports, Inc.* v. *Strickland Transp. Co.,* 318 I.C.C. 395, we reached the opposite result on a different factual basis. Strickland held highly circuitous motor authority between Chicago and St. Louis and New Orleans, operating through a Houston gateway. It wished to substitute the direct TOFC service of the Illinois Central Railroad for its indirect highway operation. We found that to do so would enable it to perform service entirely different from that authorized by its certificates, and would therefore constitute a destructive competitive practice. This decision was upheld by the United States District Court for the Northern District of Texas in *Strickland Transp. Co.* v. *United States,* 209 F. Supp. 618 (1963). The court's opinion, we believe, eliminates any remaining doubt as to our authority to require that TOFC operations must bear some reasonable relationship to the authorized motor service for which they are substituted.

Further support for this conclusion is found in the fact, already noted in our discussion of open-tariff TOFC serv-

ice, that a motor carrier providing, through the medium of piggyback service, transportation of consolidated loads of small shipments between points which it cannot serve over-the-highway in a practicable manner, may actually be operating unlawfully as a freight forwarder. We could also point out that motor and water carriers offering joint intermodal TOFC service are required to give each customer the negative option to require that its shipment move in all-highway or all-water service. This means that the carriers themselves hold out to perform in joint intermodal TOFC service only such service as could lawfully be provided under their pertinent motor or water authority. Or, as the court expressed it in *Consolidated Freightways, Inc.*, v. *United States*, 176 F. Supp. 559, at page 563, in language quoted earlier in connection with our discussion of joint intermodal service: "It appears that the legality of the proposed trailer-on-flatcar service depends on the legality of the motor carrier service which plaintiff offers to provide at its option."

Proposed rule B-3 would have dealt with the circuity issue in the following manner:

> Motor carriers shall not participate in joint intermodal TOFC service which is to be provided in lieu of their authorized over-the-road service where the combined distance from origin to destination over the intermodal route is less than 90 percent of the distance between such points over the motor carrier's authorized highway route, except as may be permitted by the Commission upon consideration of an appropriate application filed by the motor carrier in which it seeks relief from the percentage provisions of this section.

The hearing examiners recommended a similar approach, but would have liberalized the requirement somewhat by increasing the permissible mileage saving. Their recommended rules 8A and 8B provide:

Appendix B.

(A) Motor common carriers shall not participate in Plan I TOFC service which is to be provided in lieu of their authorized over-the-road service where the combined distance from origin to destination over the intermodal route is less than 85 percent of the distance between such points computed (1) if a regular-route carrier, over its authorized regular route, or (2) if an irregular-route carrier, through any gateway point which it is required to use; *except* as may be permitted by the Interstate Commerce Commission upon consideration of an appropriate application filed by a motor common carrier or a railroad in which relief is sought from the percentage provisions of this rule.

(B) Motor common carriers participating in Plan I TOFC service which comes within the 85 percent circuity provision provided in part (A) of this rule shall file with the Interstate Commerce Commission, on the same date that tariffs or substituted service directories are filed, information showing the name of the rail carrier to be used, the total mileage from origin to destination over its all-motor route, the points between which TOFC service of the rail carrier is to be used, and the total mileage from origin to destination over the joint motor-rail-motor route to be used.

We think that this recommendation, which has drawn very little adverse criticism from the parties, supplies a generally adequate solution to the circuity problem. The 85-percent circuity provision appears to be a reasonable one, and we will follow the examiners' lead in this respect. Exceptions to these rules are taken by the Southern Railroads, but they have apparently failed to recognize the distinction pointed out above between TOFC service substituted for authorized motor service and that in which motor and rail services are joined to form an end-to-end connection. The Local and Short Haul National Conference, on exceptions, asks that we adopt a limitation on maximum allowable circuity in addition to that proposed. Just what

the benefit of such a requirement would be escapes us. A railroad operating between two given points over lines less direct than those of competing railroads is not prevented from providing service between those points if it wishes to do so, and we do not believe that there is any justification for treating differently such a railroad's provision of TOFC service—whether on an all-rail basis or jointly with motor common carriers. When an operation of this kind becomes too circuitous to be economically feasible is something which we think can properly be left to the discretion of the carriers involved.

The Bureau of Inquiry and Compliance excepts not to the recommended rules themselves, but to a statement in the examiners' report to the effect that the rules would not have a retroactive effect. If this were so, the Bureau argues, carriers already performing TOFC services which would not be permitted under the recommended rules would be given some sort of "grandfather" rights to continue such operations. Clearly, it would be impossible for us to examine all plan I TOFC tariffs now on file with an eye toward determining whether they offer only that service which a motor carrier could properly perform under the formula established in rules adopted in this proceeding. To this extent, a circuity rule would have only prospective effect, applying to future filings. However, any operation now being conducted under tariffs already on file, were it made the subject of a complaint or formal investigation, would be judged in the light of the standards set forth in such a rule and might be found unlawful, just as were the operations considered in the *Strickland* case.

The circuity rule which we will adopt will take a somewhat different form from that recommended, and we will omit the substance of recommended rule 8B which we believe would be merely duplicative of our rules 3(d) and 4(c). The following rule will be adopted:

5 *Circuity limitations.*

(*a*) Motor and water common carriers shall not participate in joint intermodal TOFC service which is to be provided in lieu of their authorized line-haul transportation, and motor and water common and contract carriers shall not utilize open-tariff TOFC service, where the distance from origin to destination over the route including the TOFC movement is less than 85 percent of the distance between such points over the motor or water carrier's authorized service route; *provided, however,* that the Interstate Commerce Commission may grant relief from the provisions of this paragraph upon consideration of an appropriate petition.

(*b*) For the purpose of paragraph 5(*a*), the distance from origin to destination over the motor or water carrier's authorized route shall be computed (1) if a motor carrier operating over regular routes, over its authorized regular service route, (2) if a motor carrier operating over irregular or a combination of regular and irregular routes, through any gateway point which it is required to observe, and (3) if a water carrier, over the most direct available all-water route.

Abandonment of service at authorized points.—Proposed rule B-9 would have required that—

Notwithstanding its participation in joint intermodal TOFC service, a motor or water common carrier shall continue to render reasonably adequate and continuous service at all points authorized to be served by it.

The obvious advantage of TOFC service to a regulated motor carrier stems from the railroads' ability to provide efficient transportation of large volumes of freight for relatively long distances. On the other hand, one of the advantages of over-the-road motor carrier service is that it offers an easy means of serving those communities lying along or near the highway, intermediate to major shipping centers. Because the longer hauls are likely to be the more profitable ones, a motor carrier may find it tempting

to perform long-distance service, through the use of piggyback, to the neglect of its over-the-highway operations and, thus, to the detriment of would-be shippers at authorized intermediate service points. We are cognizant of the difficulties facing the smaller community dependent for transportation service upon motor carriers to which it must appear as a less important, intermediate point served only in conjunction with operations between larger cities. See *Cham. of Com. of St. Joseph, Mo.* v. *Red Ball Exp. Co.*, 91 M.C.C. 513. As the interstate highway system reaches completion, and motor carriers turn naturally to the use of faster and better roads, which generally bypass all but the larger cities, its problem will become more acute.

Section 204(a)(1) of the act directs this Commission to regulate motor common carriers, and authorizes us, to that end, "to establish reasonable requirements with respect to continuous and adequate service." We therefore include in every certificate issued to a motor common carrier the specific requirement that it provide reasonably adequate and continuous service to the extent authorized. The examiners found that nothing further was necessary, and recommended that proposed rule B-9 not be adopted. We agree. The adequate-and-continuous service requirement is well known, and is one which we have frequently enforced. We think that it provides sufficient protection to the interests of those who may be affected by a particular motor carrier's over-enthusiastic embracing of TOFC service, and that the rules to be adopted here should not be encumbered by a regulation of this kind.

A railroad's responsibility for determining a connecting carrier's authority.—Proposed rule B-5 and the examiners' recommended rule 9 would have imposed upon rail carriers providing TOFC service jointly with motor or water carriers the responsibility for ascertaining whether their connecting carriers hold appropriate operating authority. The Southern Railroads, the Southern Railway System, and the

New York Central take exception to such a rule, arguing that the railroads should not be singled out and forced to "police" the operations of carriers of other modes. We do not think that a general rule such as that proposed is necessary or desirable. Other rules being adopted herein, which require full disclosure by publication of the names of the carriers participating in a joint intermodal service and the points between which TOFC service is used, should be sufficient to achieve the purposes intended by proposed rule B-5. We do, however, wish to repeat the admonition contained in the *New Haven* case, 293 I.C.C. at page 107:

Although the railroads are under no obligation to police the operations of motor carriers with respect to their certificates, we believe that, when they enter into joint-rate arrangements with such carriers, they should satisfy themselves that the motor carriers have authority to operate with respect to the commodities concerned between the points where the substituted service is performed.

Responsibility for placing and securing trailers.—Proposed rules B-11 and C-5 and the examiners' recommended rules 12A and 12B place upon railroads participating in TOFC service the responsibility for seeing that trailers are safely placed upon, secured, and removed from rail cars. The only substantive objection to such a rule appears in the reply to exceptions of the Western Railroads which are apprehensive lest it impose upon them a liability to third persons, including employees. We think it obvious that in adopting a rule of this kind we are not in any way attempting to fix or to predertermine a rail carrier's liability for any injury which might be suffered by an employee or other person. We are simply attempting to promote and encourage safe railroad operation, and we believe that a rule such as that proposed is necessary. We shall, therefore, adopt the rule recommended by the examiners, modifying it only to the extent necessary to in-

corporate a minor change suggested by the Bureau of Inquiry and Compliance which will serve to clarify the relationship between a railroad and a connecting carrier to which it may have delegated the responsibility for loading and securing trailers:

6 *Responsibility for placing and securing trailers.*

(*a*) Railroads participating in TOFC service shall assume responsibility for the safe securing of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) on the rail cars when moving over their lines; and, unless otherwise provided for by tariff, or in the case of connecting common carriers by agreement, railroads shall also assume responsibility for the safe placing of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) on rail cars and for removing them from rail cars.

(*b*) Railroads participating in TOFC service have the right to refuse to accept for transportation in such service any highway trucks, trailers, or semitrailers (or the demountable container portion thereof) which do not conform to the motor carrier safety regulations prescribed by the Commission.

TOFC Tariff Publication and Equipment Leasing

We will consider together the related issues raised by the proposed rules and treated by the examiners in recommended rules 13 through 17 governing the filing by rail carriers of TOFC tariffs. Proposed rule C-1 would have required that tariffs offering all-rail TOFC service take one of two prescribed forms, either providing for the furnishing of complete door-to-door service by the railroad (plan II) with appropriate allowances where the shipper furnished the trailer or terminal services, or providing for the furnishing by the railroad of only ramp-to-ramp service (plan III) with a schedule of additional charges where it furnished the trailer or terminal services. Rules C-2 and C-6 would have required that TOFC tariffs specify whether

rates include such services as pickup and delivery, and that they state in clear and explicit terms the charges for and the rules governing demurrage, storage, switching, weighing, loading and unloading, and the like. Rule C-3, completely barring equipment leasing, would have provided:

Railroads or persons under common control with railroads shall not for use in TOFC service lease, directly or indirectly, highway trucks, trailers, or semitrailers, and/or rail cars, to or from shippers or freight forwarders.

Proposed rules B-10 and C-4 would have forbidden common carriers to act as agents of shippers without providing therefor in their tariffs.

The examiners found that there is neither need nor justification for adopting rule C-1 requiring that TOFC tariff publications follow a specified form or rule C-3 prohibiting the leasing of equipment by rail carriers for use in TOFC service. They did, however, conclude from their appraisal of the evidence that there is a need for formal rules to spell out the obligations of rail carriers performing all-rail TOFC service so as to make clear not only the basic quantum of service being offered and the rates therefor, but also the variants on that basic service and the allowances or charges due to or from shippers electing such variants. They placed the leasing of equipment in the latter category, and found that the publication of leasing charges, along with those for other accessorial or special services, would effectively eliminate any opportunity for rebates, concessions, or discriminatory treatment. Recommended rule 14 would provide:

Each railroad performing, or holding itself out to perform, TOFC service shall publish, post, and file tariffs (by itself or through an agent) which shall contain in clear and explicit terms all of the rates and charges for and the rules governing the leasing of equipment to or from shippers, freight forwarders, and/or consignees and other special or accessorial services or practices, including charges for pickup and/or delivery service when such charges are in addition to line-haul transportation charges.

Appendix B.

Recommended rule 13 deals with allowances and provides:

> No allowance shall be payable to any shipper, freight forwarder, and/or consignee which renders any service or furnishes any instrumentality in connection with TOFC service unless: (1) such service or instrumentality is the obligation of the carrier under the applicable rate designated by the shipper, and (2) the amount of the allowance is published in tariffs on file with the Interstate Commerce Commission.

The examiners' recommended rules 15, 16, and 17 require that TOFC tariffs define the areas within which pickup and delivery services are provided, that they specify the extent to which published charges include loading and unloading, and that they provide for demurrage and storage charges with respect to highway vehicles and rail cars furnished by shippers or forwarders. They recommended rejection of proposed rules B-10 and C-4 which dealt with carriers acting as shippers' agents on the ground that the rules were unneeded and unclear, a finding with which we agree.

The examiners' proposed method of dealing with tariff publication and the leasing of equipment is acceptable to all the railroads participating in this proceeding except the New York Central, which contends that the Commission has no power to require publication of charges for accessorial services. The A.T.A. takes exception to the recommended rejection of proposed rules C-1 and C-3. It argues (1) that it is improper for railroads to offer more than a single kind of TOFC service—for example, a complete door-to-door service (plan II) and a ramp-to-ramp service (plan III)—between the same points; (2) that we should by rule prescribe a strict format for TOFC tariffs, requiring that the only rate published be that for the most complete service a railroad is willing to offer between given points, together with a schedule of allowances due to shippers electing to provide some of the services themselves; and (3) that

the leasing of equipment by railroads or their affiliates to shippers should not be allowed as it is a fraudulent practice by which the rail carriers shirk their obligation to provide the equipment needed to provide transportation service and which opens the door to discrimination. Exception to specific aspects of the recommended tariff rules is also taken by Seatrain Lines, which asks that the rule requiring publication of leasing charges be extended to include the practice of leasing equipment by rail affiliates as well as by the railroads themselves, and the Bureau of Inquiry and Compliance, which suggests editorial changes in recommended rules 13 and 14.

Proposed rule C-1 was designed to further the worthy aim of tariff simplification. TOFC service, because of its flexibility, can take many forms; in fact, A.T.A. has enumerated 256 different combinations of line-haul transportation, pickup and delivery services, and various accessorial services which a railroad might provide. Under present rate publication practices, it would be possible for a railroad to offer what amounts to exactly the same service in a variety of ways. A shipper wishing to use TOFC service obviously expects the railroad to provide the line-haul transportation. Let us assume a situation in which such a shipper also expects the railroad to provide the trailer, but plans itself to load the trailer and to move it to the railroad's TOFC terminal. It expects the railroad to perform the necessary loading, securing, and unloading of the trailers, and it also wishes the railroad to deliver the trailer to the consignee's door and to unload it. This shipper might well be able to obtain the service it wants under two separate rates: a door-to-door rate (plan II) minus allowances for shipper loading and drayage at origin; or a ramp-to-ramp rate (plan III) plus charges for the railroad's providing the trailer and drayage and unloading at destination.

It is apparent that this state of affairs places a premium on a shipper's having a sophisticated traffic de-

partment, capable of assessing the various available services, charges, and allowances, and of determining what combination offers the best transportation bargain in moving a particular shipment. We think that carriers should be encouraged to use as simple a method of tariff publication as possible, and should be discouraged from permitting the kind of situation illustrated. It is also clear that the general practice by which railroads and their affiliates trip lease trailers to shippers for immediate use in TOFC service contains potential seeds of discrimination. Unless the same opportunity to lease equipment is made available to all similarly situated shippers at the same price, the leasing of a trailer to a favored shipper can become a concession violative of the Elkins Act.

While we recognize that there are opportunities for discrimination in present rate publication and equipment leasing practices, we cannot agree with the A.T.A. that the only available cures are a straitjacket for TOFC tariffs and major surgery to excise trailer leasing. The contentions that rail carriers are required by statute to publish rates only for a "complete" service and that they are obligated to furnish trailers wherever TOFC service is provided were disposed of in *Eastern Central M. Carriers Assn.* v. *Baltimore & O. R. Co.*, 314 I.C.C. 5, 45-47, *aff'd. sub nom. Cooper-Jarrett, Inc.*, v. *United States*, F. Supp. (W. D. Mo. 1964) (civil action No. 13469, February 6, 1964). The basic flaw in the A.T.A.'s legal argument, which was also pointed out in that decision, appears to be the false assumption that a highway trailer necessarily is an "instrumentality of transportation" which carriers must furnish. This can, of course, be the case when a railroad holds out a service which by its nature requires performance of some motor carriage. But it need not hold out to perform more than rail service, and in that case the trailer, tendered for transportation by a shipper, in nothing more than a container—an "article of commerce."

We must point out here that we are not holding that the service which a carrier holds out to perform can only be ascertained from the actual words of its tariff. When a rail carrier offers a ramp-to-ramp TOFC service, ostensibly confined to the line-haul rail transportation of loaded highway trailers tendered at its terminal by shippers, but then proceeds to lease trailers, and to provide drayage, loading, and other "accessorial" services, we think that it is *in fact* holding out a complete door-to-door service. In such a case, all the services it provides become *transportation* services rather than mere accessorial services, and they are required to be the subject of its tariff publications. This, we think, disposes of the New York Central's argument that we have no authority to require the publication of accessorial services. To agree with the Central's position would be to allow any carrier, by self-imposed limitations contained in its tariffs, to designate what it considers to be transportation services and what it considers non-transportation services. This distinction is, we believe, a matter of fact and not one that can be imposed by fiat. The nature of piggyback—the fact that its advantage lies in its being a combination of rail and motor transportation—makes rail carriers tend to offer to their customers services which were traditionally provided only by motor carriers and which can physically be performed only with motor vehicles. Such services, we believe, will normally be transportation services when offered in connection with TOFC transportation.

The existence of opportunities to engage in discriminatory practices, standing alone, will not, in our opinion, justify our requiring a strict format for TOFC rate publications or striking down the prevalent practice of trailer leasing by railroads. The record before us is almost completely devoid of evidence that these opportunities for discrimination have been misused. In spite of the variety and complexity of all-rail TOFC tariffs, they seem to be serving their purpose effectively, and we would not be justified

in imposing a new scheme of publication in the absence of specific shipper complaints. The same appears to be true of trailer leasing. Where complaints of discrimination have been made, as in the case of certain midwestern meat packers, the railroads involved have taken steps to correct the situation. We agee with the examiners that tariff rules providing for the publication of charges for leasing trailers and for other special TOFC services will eliminate many of the present opportunities for abuse. Should this approach prove ineffective, additional steps can be taken at some future time. At present, we conclude that they are not needed, and that regulations substantially similar to those recommended will suffice. The only significant change we think necessary in the recommended tariff rules is to provide for publication by rail carriers of the leasing charges of affiliates. To omit the practices of rail-affiliated leasing companies from the effect of the leasing rule would obviously be to create a legal loophole and to allow the doing by indirection of what could not be done directly. The following rules will be adopted:

7 *Tariff publication regulations.*

(*a*) Each railroad performing or holding out to perform TOFC service shall publish, post, and file tariffs (itself or through an agent) which shall contain in clear and explicit terms all of the rates and charges for and the rules governing the leasing of equipment to any person using its TOFC service (whether by the railroad itself or by any person affiliated with or controlled by the railroad or any agents of the railroad), and other special services or practices, including charges for pickup or delivery service when such charges are in addition to line-haul transportation charges. Such tariffs shall also contain, in clear and explicit terms, all amounts to be paid to any shipper for the lease of any empty truck, trailer, or semitrailer (or the container portion of any truck, trailer, or semitrailer having a demountable chassis) when such empty equipment is being transported incidentally to its prior or subsequent use in TOFC service.

(*b*) No allowance shall be payable by a rail carrier to any shipper, freight forwarder, or consignee which renders any service or furnishes any instrumentality in connection with TOFC service unless (1) such service is one that the rail carrier is obligated to perform or provide under the applicable rate and (2) the amount of the allowance is published in tariffs on file with the Interstate Commerce Commission.

(*c*) The area within which pickup and delivery service will be performed by a rail carrier offering to provide TOFC service shall be described specifically and the description published in clear and explicit terms in the tariff. It is not permissible to refer to decisions of the Commission for the description nor to state that the area within which pickup and delivery service will be performed is that defined by the Commission in a formal proceeding.

(*d*) All rail tariffs containing rates for TOFC transportation of property shall specify the extent to which such rates do or do not include the loading and unloading of property from or to the highway vehicle by the carrier. When charges in addition to the line-haul TOFC transportation charges or in addition to pickup or delivery charges, if any, are made for the loading or unloading of property, they shall be published in appropriate tariffs and filed with the Interstate Commerce Commission.

(*e*) Highway vehicles or rail cars provided by shippers or freight forwarders in connection with all-rail TOFC service, while on railroad premises, shall be subject to the storage or demurrage rules, regulations, and charges published in tariffs on file with the Interstate Commerce Commission.

Billing and Notification Rules

Section D of the proposed rules and the examiners' recommended rules 19 through 23 deal with the billing of TOFC shipments and with the notification to be given the rail carrier as to the contents of trailers tendered for movement in TOFC service.

Bills of lading and manifests.—Proposed rule D-1 would provide unequivocally that no TOFC shipment could be

transported until the origin carrier had issued a bill of lading therefor and had received from the shipper any manifest used in connection therewith. The examiners, upon finding that there was evidence of delay by rail carriers in issuing bills of lading in connection with TOFC movements, recommended that a rule requiring the prompt issuance of either a receipt or a bill of lading be adopted. They also recommended that this rule require submission of a manifest where used—not immediately, but within 24 hours after the shipment reaches the destination ramp. Their recommended rule 19 would provide:

> No shipment shall be transported in or in connection with TOFC service until the originating carrier has issued a receipt or bill of lading therefor, and where a manifest is used by the shipper or freight forwarder, such manifest shall be delivered to the originating carrier not later than 24 hours after the shipment reaches the destination ramp.

As the examiners point out, none of the parties have any objection to a rule requiring the issuance immediately of a bill of lading, although the eastern railroads point out that this matter is also under consideration in Ex Parte No. 73, Regulations for Payment of Rates and Charges, which was reopened on July 29, 1963. The notice of proposed rulemaking in that proceeding states that one of the questions to be considered is whether or not existing regulations should be modified "to require that sufficient information to render a freight bill be made available to the railroad within a reasonable period of time after delivery or after the shipment leaves the origin." These exceptants suggest that adoption of a rule such as that proposed would be more appropriate in Ex Parte No. 73. We think, however, that insofar as TOFC service is concerned, all billing rules should be promulgated herein and thus be available, for the sake of convenience, as a single and consistent unit in one place. The following rule, therefore, will be adopted:

8(*a*) No shipment shall be transported in or in connection with TOFC service until the originating carrier has issued a receipt or bill of lading therefor.

The principal objection to proposed Rule D-1 is to the requirement that any manifest used would have to be received by the carrier before the transportation was begun. The examiners' recommended modification of this aspect of the rule to permit delivery of the manifest up to 24 hours after the trailer reached the destination ramp seems to be generally acceptable to the industry. It is the subject of exceptions of only three parties, the Eastern Railroads, the Florida Shippers, and the Bureau of Inquiry and Compliance, all of which point out that there are instances in which a manifest is prepared by a shipper for its own use and in which it is not used or needed in assessing the freight charges. We think that they are correct in arguing that there is no reason for requiring that such a manifest be delivered to the carrier, but where a manifest is necessary for the determination of freight charges, the rules to be adopted herein should require its provision. There is no need for such a requirement to be stated as a separate regulation, however, and it can more conveniently be incorporated into the proposed rule next to be discussed; namely, the requirement that carriers obtain from shippers a certification of the weight and contents of trailers used in TOFC service.

Certification of trailer weight and contents.—The examiners recommended adoption of their rule 20A, which is almost identical to proposed rule D-2. This rule would require:

Certification as to the weight of a highway truck, trailer, semitrailer (or demountable container portion thereof) shall be made by the shipper at the time of its tender to the originating carrier.

They also recommended adoption of the following rule 20B in addition to those originally proposed:

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Shippers shall certify at the time of tendering a shipment to the originating carrier, whether or not the contents of a highway truck, trailer, or semitrailer (or the demountable container portion thereof) consists of (1) any commodity which is prohibited from movement in TOFC service by the carrier's tariff, and (2) explosives or other dangerous articles.

Perhaps none of the proposed rules has drawn as much uniformly adverse comment from rail carriers and shippers as has rule 20A. The Eastern, Western, and Southern Railroads, the Southern Railway System, the National Industrial Traffic League, and the Florida Shippers complain that the rule as drafted is unclear in that it does not specify whether it is the weight of the trailer itself, its contents, or both that must be certified; that to require certification by a shipper of the weight of a trailer in circumstances where the shipper does not furnish the trailer would be unreasonable; and, most important, that requiring certification of weight at the time of tender to the originating carrier would place an impossible burden upon shippers and carriers alike, discriminating against small shippers not having ready access to highway scales, and making it difficult if not impossible to use piggyback loading facilities at small stations where scales are not available.

It was originally contemplated that proposed rule D-2 would accomplish two purposes. First, it was believed, and the record clearly bears out this belief, that in many instances rail carriers, in spite of the fact that their rates for performing TOFC service are based on the weight of loaded trailers or their contents, are not in fact ascertaining whether the relevant weights exceed stated maxima. The rule, then, was intended to insure that information needed to determine applicable charges is obtained by the carrier. We agree with the examiners that a rule which will accomplish this purpose is necessary. In addition, it was thought that a requirement that the carrier be informed of the weight of a loaded trailer prior to its trans-

portation in TOFC service would provide needed information to the rail carrier, enabling it to assess power requirements for a given train and to insure that a particular flatcar would not be dangerously overloaded. We are convinced, however, that the record before us will not support the conclusion that a rule such as this is needed for these reasons. There is no indication that the possible weight variances of loaded highway trailers has constituted or will constitute an operational or safety problem for the railroads.

We think it unnecessary, therefore, to require that certification of the weight of TOFC shipments be made at the time the shipment is tendered to the originating carrier. Also, there is no reason to require the provision of such information unless it is actually needed for a determination of the freight charges. We think it sufficient, as in the case discussed above where a manifest is used, where knowledge of the weight or nature of a TOFC shipment is needed to determine the freight charges, that certification thereof be delivered to the originating carrier within 24 hours after the shipment reaches its destination. However, it is clear that once a loaded trailer leaves the line of a railroad, it will very likey be impossible for the carrier to ascertain its weight, so we shall make it a further requirement that the rail carrier shall not relinquish possession of a TOFC shipment until it has received certification as to its weight from the shipper or has itself weighed the loaded trailer. Finally, we think it more appropriate to direct this rule to the carriers which we regulate rather than to shippers. It will be phrased to require carriers by tariff publication to in turn require shippers to deliver manifests and to certify the weight and nature of TOFC shipments.

The following rule will be adopted:

8(*b*) Carriers by tariff publication shall require that where a manifest or a statement of the weight or nature

of a TOFC shipment is needed to determine the TOFC freight charges, such manifest or a certification by the shipper as to the weight or the nature of the shipment shall be delivered to the originating carrier within 24 hours after the shipment reaches its destination; *provided, however,* that where the weight of a loaded highway truck, trailer, or semitrailer (or the demountable container portion thereof) or the weight of the contents thereof is needed to determine rail TOFC freight charges, the rail carrier shall not relinquish possession of the shipment until it has received certification from the shipper as to such weights or has itself ascertained them.

A regulation such as the examiners' recommended rule 20B is, in our opinion, unnecessary. It is necessary, for reasons of safety, that a carrier be informed when it is tendered a shipment containing explosives or other dangerous articles, but the examiner's recommended rule 22—which, as will be noted below, we are adopting in substance—is all that is needed to accomplish this purpose. On the other hand, if a rail carrier wishes to restrict TOFC service against the transportation of other articles, the carrier will, of course, have to inform the public of that fact through appropriate tariff publication, and it is obvious that it will have to establish some means of ascertaining from the users of its service the nature of their shipments. It seems likely that this information would be needed to prepare the bill of lading, which rule 8(*a*) will require be issued before TOFC transportation is begun. At any rate, we believe that how to obtain this information is a matter best left to the managerial discretion of the rail carrier and one that need not be the subject of a formal regulation.

Multiple-trailer rail rates.—It is a common practice of railroads offering open-tariff TOFC service to publish reduced rates covering the movement of two or more trailers. Proposed rule D-3, which would place certain restrictions on this practice, reads as follows:

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Unless otherwise provided for and made available to other shippers and carriers, two or more highway trucks, trailers, or semitrailers (or the demountable container portions thereof) shall be tendered on the same day in order to qualify for a rate for the movement of multiple highway vehicles (or the demountable container portions thereof).

The examiners, noting that the Commission is without power to require a rail carrier to provide TOFC service jointly with motor carriers, rejected that portion of proposed rule D-3 which would allow complete flexibility to rail carriers offering multiple-trailer rates, provided that they were "made available to other shippers and carriers." Their recommended rule 21 is thus much more restrictive than that originally proposed. It would provide:

In order to qualify for a rate applicable on the movement of multiple highway vehicles (or the demountable container portion thereof), two or more highway trucks, trailers, or semitrailers, (or the demountable container portions thereof) shall be tendered to the carrier within the time period, not to exceed one calendar day, specified in tariffs on file with the Interstate Commerce Commission.

All the rail carriers filing exceptions object to this rule, principally because of the requirement that trailers to take advantage of the multiple rate be tendered on the same calendar day. The Southern Railroads and the Southern Railway System would have no objection to a rule that trailers must be tendered within a 24-hour period, as this is now a common tariff requirement with respect to multiple-vehicle rates. These carriers, and the Western Railroads as well, take issue with the examiners' finding that "to change the time limit to 24 hours would make it difficult, if not impossible, to keep track of which trailers, if any, were tendered within that time limit." They point out that many railroads regularly keep records of the exact time when trailers are received, and that the record herein fails to support the examiners' conclusion that undue diffi-

culty would be encountered in complying with a requirement that this be done.

The A.T.A. believes that this rule should be made more restrictive and that only when trailers are tendered simultaneously should they be allowed to qualify for a reduced multiple-vehicle rate. It contends that volume rates are permissible only so long as they apply to a single "shipment" and that unless trailers are tendered at the same time, they cannot be said to constitute one shipment. It also argues that the only justification for such a rate stems from cost savings to the rail carrier resulting from its handling of more than one trailer together instead of separately, and that where trailers are tendered separately, the cost advantage must be lost.

We cannot agree with the A.T.A., and we do not think that the cases which it cites, including *Coal to New York Harbor Area,* 311 I.C.C. 355, *Wearing Apparel, Railway Exp. Agency, Inc.,* 301 I.C.C. 177, and *Consolidation—Great American Transport, Inc.,* 66 M.C.C. 423, support its position. Volume rates of various kinds have been approved many times by the Commission even where, as in *Coal to New York Harbor Area,* the involved traffic was to be tendered in multiple shipments over a long period of time. Needless to say, such a rate may in certain instances be found to be discriminatory as designed to afford a special advantage to a particular shipper or group of shippers, which was found to be true in *Consolidation—Great American Transport, Inc.,* but this is a matter for determination on an individual case basis. It would clearly be inappropriate in a proceeding such as this to issue a general condemnation of volume rates applicable to TOFC shipments. In fact, we cannot agree with the examiners that it is necessary to impose any time limit within which trailers must be tendered in order to qualify for a multiple-vehicle TOFC rate. So long as the carrier offers the same volume rates to all persons wishing to use its service, as is required by sec-

tion 2 of the act, such rates would not be per se unlawful, and the rules to be adopted herein will recognize this. Where the applicable tariff publication does not provide a fixed period in which trailers must be tendered for the purposes of volume rates, we shall provide that this period will be one calendar day, which is the time now specified in rule 14 of the current Uniform Freight Classification.

The following rule will be adopted:

8(*c*) Unless a rail carrier by appropriate tariff publication specifically provides otherwise, in clear and unequivocal terms, two or more highway trucks, trailers, or semitrailers (or the demountable container portions thereof) shall be tendered within one calendar day in order to qualify for any rate for the movement of multiple highway vehicles (or for the demountable container portion thereof).

TOFC transportation of dangerous articles.—No exception has been taken to the examiners' recommendation that the following rule, their recommended rule 22, which corresponds to proposed rule D-4, be adopted:

Arrangements for the movement of highway trucks, trailers, or semitrailers, (or the demountable container portion thereof) containing explosives or other dangerous articles shall be made by a shipper or carrier with a railroad in sufficient time to permit the latter properly to placard and position the rail cars used for the movement; *except* that shipments containing explosives or other dangerous articles shall *not* be transported in TOFC service unless the shipper, at the time of tender to the originating carrier, certifies that the shipment complies with the Interstate Commerce Commission's regulations governing explosives and other dangerous articles as described in 49 C.F.R. 71-78.

The need for such a rule for safety purposes is obvious, and with minor editorial modifications we shall adopt it as rule 8(*d*).

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Mixture rules applicable to all-freight rates.—It is a common practice for railroads offering TOFC service under all-commodity rates to include provisions limiting the quantity, by percentage of total weight, of any one article in a given shipment. Such provisions, having as their objective the protection of the railroad's straight carload traffic, have been approved by the Commission. Proposed rule D-5 would have established a standard mixture rule, certification form, and penalty provision:

All-freight (all-commodity) rates that are restricted to apply only when not more than a designated percent of the shipment consists of one article or commodity shall be made subject to the following tariff provision:

Rates subject hereto apply only when shipper certifies on shipping order and bill of lading at time of shipment as follows:

"Not more than ..... percent of the articles (or commodities) in this shipment consists of an article or articles embraced by the commodity description of a single item of the current Uniform Freight Classification."

If the certificate has not been signed at the time when the bill of lading is issued such all-freight (all-commodity) rates do not apply; and the applicable rate on the shipment will be .....

[In the blank space there must be inserted a specific statement of the rate or charge that will apply, such as, for example: "the Class 45 rate applicable over the route of movement subject to a minimum weight of 30,000 pounds."]

The examiners found that there is general agreement that some reasonable mixture provision is needed; that the Uniform Freight Classification is not a proper basis for such a provision; that if the tariff within which the all-freight TOFC item is included contains a list of commodity rates, it would be proper to refer to such a list to determine if the articles included in the TOFC shipment are in fact different for rate classification purposes; but that a general rule based on this approach would be ineffective as it could not be drafted to cover all possible situations.

They took the position, therefore, that the railroads themselves should be given the opportunity to make their tariff provisions governing mixture rules more clear and explicit; and that the carriers should provide in their tariffs that shippers must certify that the shipment consists of more than one article as described in the applicable tariff, and the percentage by weight which a particular article bears to the entire shipment. They recommended that the following regulation (rule 23) be adopted:

> All-freight (all commodity) rates that are restricted to apply only when not more than a designated percent of the weight of the shipment consists of one article shall be made subject to tariff provisions describing in clear and explicit terms the conditions under which such rates apply.

No exception is taken to this aspect of their recommended order.

We are in general agreement with the examiners' findings with respect to the need for a regulation governing mixture rules, but we do not think that their recommended rule 23 is entirely adequate. We believe that it is necessary, if abuses are to be avoided, that a tariff in which an all-freight rate subject to a mixing rule is published contain or refer to a readily available freight classification from which it can be determined what constitutes a "single article" for purposes of the mixture rule. To eliminate possible confusion, we also think it desirable that the regulation provide specifically that the relationship of a single item to the entire shipment be expressed in terms of comparative weights, and that the tariff specify the means by which the applicable rate will be determined should a shipment fail to qualify for the all-freight rate. The rule which we shall adopt will contain these provisions:

> 8(*e*) All-freight (all-commodity) rates that are restricted to apply only when not more than a designated proportion of a shipment consists of a single article shall be made

subject to tariff provisions which (1) shall describe in clear and explicit terms the conditions under which such rates apply, (2) shall contain or refer to a commodity classification, such as the current Uniform Freight Classification or a designated tariff, from which it can be determined what constitutes a "single article" for purposes of the all-freight rate, (3) shall require certification by the shipper of the percentage which the weight of a given article bears to the weight of the entire shipment, and (4) shall specify the means by which the applicable rate will be determined should a shipment fail to qualify for the all-freight rate because it contains more than the designated proportion of one article.

Payments to Labor Unions by Motor Common Carriers Using TOFC Service

It has become a common practice for labor contracts between motor common carriers and the bargaining agents for their employees to contain a provision that the carrier will pay a specified sum, usually $5, to a labor union's pension or welfare fund each time a trailer is transported in TOFC service. One such clause, article 45 of the Central States Area Over-the-Road Motor Freight Agreement for the period February 1, 1961, to January 31, 1964, reads as follows:

> The Union reserves the right to re-open this Agreement for the purpose of negotiations for employees engaged in operations which combine with or are part of other methods of transportation such as "piggy-back," barge, etc. If the parties are unable to agree upon such matters, the Union may engage in lawful economic recourse in support of its demands. This shall not apply to such operations as were in existence prior to January 1, 1955.
>
> Effective February 1, 1962, for each trailer or container placed on, or delivered to, rail flat cars, birdy-back, fishy-back, or barge operations the sum of Five ($5.00) dollars shall be paid into either the Pension or the Health and Welfare Fund as the Union may direct provided the parties

have not before then agreed to a mutually satisfactory alternative to the problems created by such methods of transportation. To that end the parties shall appoint a committee to study and recommend possible solutions.

The Eastern and Southern Railroads and the Bureau of Inquiry and Compliance urge that we adopt regulations prohibiting motor common carriers from making payments to labor unions as a prerequisite to moving traffic in TOFC service. The examiners found that this proposal was beyond the scope of the present proceeding. We do not agree. Even though the proposed rules did not touch upon this matter, the notice of proposed rulemaking was sufficiently broad to encompass it, stating, as it did, that we would consider evidence bearing on rules which might be needed "to regulate, in the public interest, the utilization of coordinated and substituted service transportation from a competitive standpoint or otherwise," and "all related matters inherent in or to the basic purpose underlying this investigation."

We are asked to prohibit payments to labor unions when TOFC service is used on the ground that they constitute illegal rebates and concessions under section 1 of the Elkins Act, 49 U.S.C. section 41(1). *United States* v. *Braverman*, 373 U. S. 405 (1963), is cited by the Western Railroads as supporting the proposition that the force of the Elkins Act extends not only to shippers and carriers but to *any* person "tamper[ing] with the statutory scheme." (373 U. S. at 408.) However, section 1 of the Elkins Act, and related sections of the Interstate Commerce Act such as section 222(e), prohibit the giving and receiving of rebates and concessions to the end that transportation service be obtained at less than applicable tariff rates. We have not been shown how the payment by a motor carrier to a labor union under the circumstances covered by employment contracts such as that quoted above could result in any person's obtaining transportation services at

less than published charges. Consequently we must conclude that such agreements do not constitute tampering with the statutory scheme in any way which is prohibited by the Elkins Act, and that the *Braverman* decision is not in point here.

This Commission is charged only with the regulation of transportation, and then only to the extent provided in the Interstate Commerce Act. Our writ runs only to the carriers subject to that act, and to others to the limited extent provided in the Elkins Act. We are not charged with the regulation of labor-management relations, even as to the carriers which we regulate. This is the province of the National Labor Relations Board, to which the Congress has entrusted the supervision over agreements between carriers and labor organizations affecting labor relations. We therefore lack the jurisdiction to consider the legality of such agreements. *Galveston Truck Line Corp.* v. *Ada Motor Lines, Inc.*, 73 M.C.C. 617, 625.

Should a carrier subject to our jurisdiction enter into a union contract under which it attempted to bargain away its statutory obligations, we would have the necessary authority to order it nevertheless to perform such obligations, but we would not have the authority to strike down that contract as void or to pass regulations forbidding the execution of subsequent similar contracts. The *Galveston Truck Line* case just cited involved a complaint against a number of motor common carriers which had refused to accept interline shipments tendered by the complainant, a non-union carrier, because their labor contracts contained so-called hot cargo clauses. We entered an order requiring these carriers to cease and desist from such practices because they resulted in an abdication of their statutory duty as common carriers to render reasonably adequate and continuous service. In *Carpenters' Union* v. *National Labor Relations Board*, 357 U. S. 93 (1958), generally known as the *Sand Door* case, the Su-

preme Court commented with approval on our action in the *Galveston Truck Line* decision, saying, at page 109:

It is significant to note the limitations that the Commission was careful to draw about its decision in the *Galveston* case. It was not concerned to determine, as an abstract matter, the legality of hot cargo clauses, but only to enforce whatever duty was imposed on the carriers by the Interstate Commerce Act and their certificates. The Commission recognized that it had no general authority to police such contracts, and its sole concern was to determine whether a hot cargo provision could be a defense to a charge that the carriers had violated some specific statutory duty.

Although we have ample authority to require a carrier subject to our jurisdiction to fulfill its legal duties, we must act circumspectly in taking any other action which might encroach upon the area of labor relations lying within the ambit of the NLRB. *Burlington Truck Line* v. *United States,* 371 U.S. 156, 172 (1962).

Motor common carriers have the statutory obligation, imposed by section 216(b) of the act, to provide adequate service, and their certificates contain the further condition, prescribed by us under sections 204(a)(1) and 208, that they provide reasonably adequate and continuous service. While we would not wish to predict future standards of reasonableness for motor carrier service, even were we able to do so, certainly at present no motor common carrier could be found to be violating its duty to provide adequate service by failing to offer TOFC service in lieu of all-highway transportation. We must conclude, therefore, that motor carriers, in honoring labor contracts providing for a payment to a union fund for each trailer transported in piggyback service, do not thereby violate the Interstate Commerce Act. This is not to say that we approve of such arrangements. We have said repeatedly that we favor the increase of intermodal transportation

generally, and the growth of TOFC service in particular, and it seems clear to us that labor contracts such as these must have a deleterious effect upon their development. Any remedy for this situation, however, must lie not with this Commission but with the Congress.

FINDINGS

We find that title 49, chapter 1, of the Code of Federal Regulations requires modification by the adoption of subchapter E, "Intermodal Transportation, part 500, Practices of For hire Carriers of Property Participating in Trailer-on-flatcar Service," containing the rules set forth in appendix IV hereto, and that such rules are reasonable and necessary, and should be prescribed. An appropriate order will be entered.

COMMISSIONER HUTCHINSON, concurring in part:

While I agree with the majority's repudiation of the concept that a person may not act as a carrier and a shipper as to the same shipment, I do not believe that a motor carrier's use of an "open tariff' under Plan III should be placed on a mandatory basis. A mandatory requirement raises serious legal questions which are not adequately answered in the majority report. Mandatory use of Plan III results in the forced establishment of through motor-rail routes contrary to the provisions of the act, and it is no valid answer to say, as does the majority report, that there is "no compulsion whatever" on the rail carriers to hold out a TOFC service. Clearly, there is a considerable degree of compulsion inherent in a rule which says, in effect, that Plan III rates can be established by the railroads for shippers only if the service is also held out for motor carriers acting as shippers. This diminishes the right of the railroads under section 3(1) with respect to the traffic of other carriers. The possibility, expressed in the ma-

jority report, that a railroad's refusal to provide service for motor carriers pursuant to a Plan III tariff might violate section 2 of the act does not justify the mandatory requirement since the purview of section 2 cannot be enlarged by rule.

I agree with the determination that Plan I involves joint rates and through routes and that TOFC service provided under Plan I and Plan III should bear a reasonable resemblance to the all-highway service for which it is substituted. However, a circuity limitation in the form of a percentage possesses certain inherent defects. Reliance on such a limitation could, in some situations, encourage wasteful transportation and place a premium on circuitous rail routes as alleged in the exceptions. Moreover, the percentage limitation imposed will be virtually impossible to apply fairly in situations where the trailer is loaded with more than one shipment originated at and/or destined to different points. For example, operations under Plan I might involve a trailer loaded with individual shipments originated at various points in New England, Pennsylvania, Ohio, and Indiana and destined to New Orleans, La., and points beyond, with interchange at St. Louis, Mo. The 85 percent circuity limitation promulgated in the majority report is to be applied from origin to destination over the route including the TOFC movement. But which origin and destination? Which "route" is to be used to determine whether a particular TOFC movement satisfies the percentage limitation? I am not convinced that a percentage limitation is the proper answer to the problem.

The fundamental distinction between Plan I and Plan V operations is that the tariff rules covering Plan I service include a specific holding out by the motor carrier to perform an all-highway service at the election of the shipper, whereas the rates provided in Plan V tariffs are applicable only over joint intermodal routes and no option is extended. Since the basic holding out (that which the

shipper can demand) under Plan I is for an all-highway service, it necessarily follows that Plan I rates should be compensatory over the all-highway service route. Moreover, a requirement that Plan I rates must be compensatory over authorized service routes would afford adequate protection against unduly circuitous and wasteful operations.

The rationale of the foregoing discussion is, of course, equally applicable when carriers use open-tariff TOFC service but not when the holding out is limited to joint intermodal service as under Plan V. There is no sound basis for the imposition of a circuity limitation on a Plan V operation since each participating carrier operates in its own right over its own routes and no all-highway service is held out to the public. Since there is no real problem of circuitous operations in connection with contract carriers, no worthwhile purpose is served by including them in a rule. I would adopt the following rule instead of the one promulgated by the majority:

5(a) Motor and water common carriers shall not participate in Plan I joint intermodal TOFC service which is to be provided in lieu of their authorized line-haul transportation, and shall not utilize open-tariff TOFC service unless the rates for such service are compensatory over the all-highway or all-water service routes.

I disagree with rules 6(a) through 8(e) respecting the placing and securing of trailers, tariff publication, and billing and notification. The majority report does not adequately explain the necessity for adding new rules to our present tariff and other requirements. These additional, complicated, and burdensome rules, which will needlessly retard the growth of TOFC service, appear to be based on fear of "potential discrimination." However, as recognized in the majority report, no shippers are complaining of unfair treatment.

Appendix B.

VICE CHAIRMAN WEBB, dissenting:

Piggybacking is the brightest star in the transportation firmament. Its remarkable growth has been due to voluntary intermodal coordination, carrier-shipper cooperation, and a form of regulation which, until today, minimized compulsion and maximized competition. Viewing the dynamic growth of piggybacking in the light of the novel and onerous restrictions now decreed by the Commission, carriers and shippers may well conclude that nothing fails like success.

Transportation has many serious problems, but piggybacking is not one of them. Piggybacking is not an economic problem, one reason being that it has eluded the rigorous regulation applied to older and more conventional forms of surface transportation. Stated differently, the conventional forms of regulation, because of regulatory lag and for other reasons, could not be adapted immediately and completely to rapidly changing trailer-on-flatcar (TOFC) rates and services. As a result, no other form of regulated surface transportation has enjoyed so much freedom.

The Commission's regulation of TOFC service has been influenced, of course, by factors other than regulatory lag. The end result has been regulation that is flexible, mild, empirical, and, on the whole, quite perceptive. The Commission's new approach to TOFC regulation substitutes compulsion for voluntarism; conformity for diversity; rigidity for flexibility; confusion for clarity; complexity for simplicity; and, most likely, failure for success.

A majority of the rules promulgated in this proceeding merely restate generally accepted principles and practices.[1] Since these rules are established in Commission

[1] Rules 1, 4(b), 4(c), 4(f), 5(b), 6, 7(b), 7(c), 7(d), 7(e), 8(a), 8(c), 8(d), and 8(e)(1). Although the time period specified in Rule 8(c) should be "within a 24-hour period" rather than "one calendar day," the rule permits carriers to publish any different period they desire.

decisions or in less formal publications, their inclusion in appendix IV of the report was not necessary.[2] These noncontroversial rules will not deflect the present course of TOFC regulation, although they will impart an undesirable rigidity. However, the absence of objection to a majority of the rules promulgated should create no presumption that the remaining rules will not materially harm carriers and shippers.

The remaining rules, the majority asserts, are intended to foster the growth and development of piggybacking. But with one possible exception,[3] all of the rules in question impose some new restriction or prohibition.[4] Obviously, the Commission believes that more regulation will stimulate the expansion of TOFC service. In my opinion, TOFC service will shrink and deteriorate in direct proportion to the Commission's willingness and ability to enforce the rules prescribed in this proceeding.

Rules 2 and 3 will be considered together since the latter implements the former. In my judgment, the prescription of open-tariff TOFC service is rash, contrary to law, and harmful to carriers of all modes and shippers of all sizes. In addition, the compulsory open-tariff rule has ramifications which extend far beyond the realm of piggybacking.

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[2] A number of the objectionable rules contain superfluous provisions. For example, Rule 3(a) ostensibly accords to freight forwarders the right to use rail open-tariff TOFC rates. The fact is that forwarders are required by Part IV of the act to utilize the services and open tariffs of rail and motor common carriers. The rules are also padded by the inclusion of water contract and water common carriers. Almost all of the movements that would be involved in any substantial water-rail TOFC service would be performed in part in so-called fishyback service. Such service is beyond the scope of the rules set forth in appendix IV.

[3] Rule 4(e) makes it clear that a motor common carrier may participate in Plan I TOFC service even though the motor movement is limited to terminal areas.

[4] Rules 8(b) and 8(e)(2), (3), and (4) impose restrictions not contained in the rules as initially proposed or as recommended by the examiners. I am unable to estimate their severity.

Pressed to its logical conclusion, rule 2 would revolutionize transport regulation to the detriment of all concerned.

The general concept of open-tariff TOFC service was embodied in the President's Transportation Message to the Congress of April 5, 1962,[5] in a recommendation designed to:

> Assure all carriers the right to ship vehicles or containers on the carriers of other branches of the transportation industry at the same rates available to noncarrier shippers.

That recommendation was singular in that it called for increased regulation of surface transportation. All the other recommendations in the President's Message, insofar as they related to the Commission's economic authority, were designed to equalize competitive opportunities under diminished regulation. The Commission opposed all of the President's deregulation proposals. It now adopts the only recommendation in the President's Message which called for an enlargement of Commission authority. Two differences between the Commission's action and the President's recommendation must be noted. First, the President recommended that compulsory open-tariff TOFC service be accomplished by amending section 216 of the Interstate Commerce Act. The Commission would achieve the same result without benefit of legislation. And secondly, the President's recommendation was advanced without the benefit of the views of all affected interests. The Commission, on the other hand, has had the benefit of the record developed in four Congressional Committee hearings in two Congresses.[6] That record shows that legislation to require

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[5] H. Doc. No. 384, 87th Cong., 2d Sess. (1962).

[6] *Hearings before the Senate Committee on Commerce on S. 3242*, 87th Cong. 2d Sess. (1962); *Hearings before the Surface Transportation Subcommittee of the Senate Committee on Commerce on S. 1062*, 88th Cong. 1st Sess. (1963); *Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 11584*, 87th Cong. 2d Sess. (1962); *Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 4701*, 88th Cong. 1st Sess. (1963).

the performance of open-tariff TOFC service attracted virtually no support.

When this proceeding was instituted, compulsory open-tariff TOFC service was not included in the rules proposed. However, proposed Rules B-4 and B-5, although similar in certain respects to the compulsory open-tariff rule adopted by the Commission, were less extreme. Nevertheless, proposed Rules B-4 and B-5 were opposed by rail carriers, freight forwarders, and the overwhelming majority of shippers. Although several segments of the trucking industry endorsed the proposed rules, the American Trucking Associations, Inc., conceded in its exceptions that the rules were "by no means essential to proper functioning of coordinated transportation, the end product of joint-intermodal TOFC service."

The examiners recommended that proposed Rules B-4 and B-5 not be adopted. The Commission concludes that the examiners were right. However, the Commission's agreement with the examiners is somewhat inconsistent with its promulgation of Rule 2.

In oral argument, compulsory open-tariff TOFC was opposed by rail carriers, freight forwarders, and several motor carriers. Shippers and shipper organizations urged the Commission not to adopt any rule which would diminish the flexibility and variety of TOFC service. It was also disclosed at oral argument that motor carriers making the greatest use of TOFC service were opposed to any compulsory open-tariff rule.[7] In this connection, it should be noted that the American Trucking Associations, Inc., recently opposed legislation in the Congress to establish the concept of equal TOFC charges for motor carriers and shippers.[8]

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[7] Counsel for the American Trucking Associations, Inc., said in oral argument: "I feel it incumbent upon me to state that the Regular Common Carrier Conference which I speak for also is of the view that the motor carrier cannot use an open tariff."

[8] *Hearings on H.R. 4701, op. cit. supra*, note 6 at 212.

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The Commission's concept of "equal TOFC charges for all" is unsound. Rule 2 erroneously assumes that the traffic of a carrier does not differ in kind from the traffic of a shipper. No rational concept of discrimination can be applied to groups of persons as dissimilar as carriers and shippers. Preferential rail rate treatment of one group (*e.g.*, motor carriers) could not possibly disadvantage the other group (shippers). Conversely, it is impossible for a shipper to derive from any rail rate any competitive or other advantage over a motor carrier. And finally, no amount of word jugglery can conceal the obvious fact that a trucker arriving at a railroad ramp with a trailerload of other people's property that he has undertaken to transport for compensation, as a part of his holding out to the general public, is a common carrier by motor vehicle, not a shipper.

Rule 2 thus embodies a spurious, abstract notion of equality. The Commission has attempted to force that concept of equality upon the transportation industry, although it is virtually unanimous in its opposition. Even if this action were not proscribed by law, it would be irresponsible in view of the meager supporting evidence of record.

Throughout this expression the open-tariff provision, Rule 2, has been called "compulsory." The report of the Commission is misleading because of the majority's effort to sugarcoat the compulsion. For example, the report states:

> We conclude that when TOFC service is offered by a rail carrier to the public generally, there is nothing to preclude its use by motor or water common or contract carriers. * * *

The truth, of course, is that rail carriers do not want to be required to offer all-rail TOFC service to the public generally but only to the shipping public. And if regulated motor carriers must be regarded as shippers for the first time in history, the railroads do not want to be required to serve them. The implications involved in treat-

ing motor carriers as shippers will be discussed later in these remarks. Whatever the status of motor carriers, however, the fact of compulsion remains. At another place in its report, the Commission states:

> However, to say that we would be requiring the establishment of through routes merely by finding that it is lawful for a motor carrier to use the open-tariff TOFC rate of a rail carrier overlooks the fact that such a finding would involve no compulsion whatever—either on rail carriers to hold out a TOFC service or, if they do, on motor carriers to use it.

Obviously, the compulsory nature of a rail carrier's participation in a through route is not altered by the fact that its motor carrier competitors may either use the route or operate entirely over the highway. What the majority appears to be saying in the above-quoted passage, and in complete disregard of the economic facts of life, is that the through routes created by Rule 2 would not be compulsory because the railroads have a choice as to whether or not they will provide all-rail TOFC service. A similar choice was presented to patrons of a carrier who operated in England in the early 17th century. The carrier's name was Thomas Hobson.

We are not in George Orwell's *1984*. Hence, there should be no reluctance to say that compulsion is compulsion; and certainly we are not required to say that coercion is freedom.

As indicated in the Commission's report, a through route may exist without a corresponding joint rate. In my opinion, Rule 2 violates section 216(c) of the act by compelling railroads to establish through routes with their motor carrier competitors. As here pertinent, section 216(c) reads as follows:

> Common carriers of property by motor vehicle *may* establish reasonable through routes and joint rates, charges,

and classifications with other such carriers or with common carriers by railroad and/or express and/or water. * * * [Emphasis added.]

Neither the Commission nor any party to this proceeding contends that "may" means "shall."

Rule 3, which implements Rule 2, is intended to create a form of substituted rail-for-motor service. Rule 4 also embraces substituted rail-for-motor service, that is, Plan I TOFC service.[9] The Commission finds that the Plan I TOFC service embraced in Rule 4 constitutes a through route arrangement within the meaning of section 216(c) of the act.

What is the difference, then, between the through routes created in the performance of Plan I substituted service under Rule 4 and the through routes that would be created in the performance of substituted service under Rules 2 and 3? Both Plan I substituted service and the open-tariff form of substituted service are governed by the circuity limitations of Rule 5. If Rule 3 is compared with Rule 4, it will be seen that both the conventional and the open-tariff substituted services are subject to tariff publication and other requirements that are identical in every respect save one. The only difference is that the through routes involved in Plan I substituted service are established with the rail carriers' consent, whereas the through routes involved in open-tariff substituted service are established without their consent.

Even if compulsory open-tariff TOFC service did not violate section 216(c), the Commission could not require rail carriers to provide such service in the absence of statutory authority. The Commission finds such authority in

[9] Plan I TOFC service is service performed by a railroad in substitution for motor common carrier service to, from, and between named points over the motor carrier's route, at the option of the motor carrier, unless otherwise directed by the shipper, the traffic moving from initial origin to final destination at all-motor rates and on motor carrier bills of lading under an arrangement or an agreement between the two modes of transportation.

section 2 of the act. If any such authority existed, Rule 2 would be superfluous. The authority does not exist.

Over the years sections 2 and 3 of the Interstate Commerce Act have coalesced. In the early history of regulation, the section 2 prohibition against unjust discrimination was deemed to be absolute. *Wight* v. *United States,* 167 U. S. 512 (1897). Later, however, the exigencies of competition were recognized as a defense against a charge of unjust discrimination. *L. T. Barringer & Co.* v. *United States,* 319 U. S. 1 (1943). As a result, the primary objectives of section 2, at least insofar as the transportation of property is involved, have been subsumed under section 3. I am not aware of any case decided during the past quarter century where unjust discrimination under section 2 was not, or could not have been found to be, undue preference and prejudice under section 3. Accordingly, the Commission's power to promulgate Rule 2 must be viewed in the light of both section 2 and section 3.

The substantial overlap of sections 2 and 3 was recognized by the Congress at least as long ago as 1935. Thus, when section 216(d) was enacted into law by the Motor Carrier Act of 1935, the language of that section was copied largely from section 3(1), but language corresponding to section 2 was not thought to be necessary. Section 216(d) reads in pertinent part as follows:

> * * * It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory * * * or to subject any particular person * * * to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Section 3(1) reads as follows, the proviso having been added by the Transportation Act of 1940:

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It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or reasonable preference or advantage to any particular person * * * or any particular description of traffic, in any respect whatsoever; or to subject any particular person * * * or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Prior to 1935, the Commission had held that it was doubtful whether section 3(1) could be interpreted as applying to discrimination between common carriers. *Okla.-Ark. Teleph. Co.* v. *Southwestern Bell Teleph. Co.*, 183 I.C.C. 771, 774 (1932). However, the above-quoted proviso was added to section 216(d) because the Congress wanted to make clear that it was concerned only with discrimination between shippers. Thus, the provisions of section 216(d) were described by Senator Wheeler as "substantially the same as those in Section 3(1) of the I.C.C. Act which has been in effect since 1887 and have always been interpreted as covering unjust and unequal treatment *by a carrier of its patrons.*"[10] (Emphasis added.) The proviso to section 216(d) was described by Senator Wheeler as making "doubly sure" that no rail carrier could base a claim of discrimination on the pricing practices of their motor carrier competitors.

The same proviso was included in section 3(1) by the Transportation Act of 1940 in the interest of equality of regulation,[11] and for the obvious purpose of making "doubly sure" that no motor carrier could base a claim of discrimination on the pricing practices of their rail com-

[10] 79 Cong. Rec. 5656 (1935).

[11] Committee Print of the House Committee on Interstate and Foreign Commerce on *Omnibus Transportation Legislation*, 76th Cong., 3rd Sess. p. 25 (1940).

petitors. After the proviso was added to section 3(1) by the Transportation Act of 1940, the Commission recognized that the section was not applicable to traffic of another carrier and that such alleged discriminations must be dealt with under section 3(4). *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 243 I.C.C. 199, 220. Section 3(4) forbids discrimination between "connecting lines," which lines are defined as the connecting line of any railroad subject to Part I of the act or that of any common carrier by water subject to Part III.

The use of the word "discrimination" in the proviso to section 3(1) is most significant. The word "discrimination" appears in section 2 but not in the language of section 3(1) preceding the proviso. The use of that word in the proviso to section 3(1) was designed to preclude the Commission from finding a discrimination as between carriers under section 2.

The Commission's interpretation of section 2 leads to this astonishing conclusion: that "discrimination" as between carriers, which is expressly permitted under section 3(1) and its counterpart section 216(d), is condemned by section 2. The Commission's conclusion is also diametrically opposed to the conclusion reached in its landmark case on piggybacking which was subsequently affirmed on appeal. *Eastern Central M. Carriers Assn.* v. *Baltimore & O. R. Co.*, 314 I.C.C. 5, *aff'd sub. nom. Cooper-Jarrett, Inc.* v. *United States*, 32 U.S. L. Week 2413 (W. D. Mo. 1964). On page 50 of its report in the *Eastern Central* case, the Commission said:

> It should be observed, also, that sections 2 and 3(1) are intended to protect shippers, not competing carriers.

The Commission's disregard of statutory language and clear legislative intent contrasts sharply with the respect for the law shown by the Executive Branch. The President, in advocating his open-tariff TOFC proposal in 1962,

asked that the Interstate Commerce Act be amended. No extenuating circumstance justifies the Commission's free-wheeling interpretation of the act. The effect of that interpretation is to create a gross inequality by permitting motor carriers to "discriminate" at will against the traffic of rail carriers, while forbidding to rail carriers the right to "discriminate" against the traffic of motor carriers. Furthermore, the Commission's bizarre interpretation of the act makes section 3(4) utterly superfluous.

Not only does the Commission lack authority to promulgate Rule 2, but its report gives no reason for the action. (See that section of the Commission's report entitled, "Open-Tariff TOFC Service.") A large part of the discussion in that section of the report relates to Commission decisions in which *voluntary* open-tariff TOFC service was found or said to be repugnant to the act. *E.g., Substituted Freight Service,* 232 I.C.C. 683 (1939). The Commission ends its discussion of voluntary open-tariff TOFC service with the following conclusion:

> We can see no justification, either from the standpoint of legislative limitations or of policy considerations, for holding that one carrier may in no circumstances make use of the services which another carrier holds out to the public generally. So long as the first carrier is operating *qua* carrier and gives the public proper notice through its tariffs, it can substitute another's service for its own in this way.

All this, however, has nothing to do with compulsory open-tariff TOFC service. Rule 2 cannot be justified by any substantial evidence of record because that evidence and the arguments based thereon show that any form of compulsory open-tariff TOFC service would be a transportation tragedy. Evidently, the majority found explication of the reasons for adopting Rule 2 too difficult a task. I would find the task impossible.

Because of its aversion to the TOFC plan number terminology, the Commission is able to avoid the appli-

cation of Rule 2 to specific types of TOFC service. It should not be supposed, however, that the only TOFC service provided by rail carriers under open tariffs is the Plan III service.[13] Plan II TOFC service,[14] modified Plan II TOFC service,[14] and Plan IV TOFC service[15] are also provided under open tariffs.

Since Rule 2 encompasses both Plan III and Plan IV TOFC service, it may very well destroy the freight forwarding industry. One of the longest nails in the coffin is the Commission's finding that the performance of some all-highway service between assembly and distribution points would exclude motor carriers from the statutory definition of a freight forwarder in section 402(a)(5) of the act. Although Rule 2 is apparently designed to place motor carriers in a position of equality with forwarders in the use of all-rail TOFC service, a greater regulatory inequality would be hard to imagine.

In the first place, forwarders, unlike motor carriers, are prohibited from performing line-haul transportation but must utilize the services of regulated line-haul carriers. Obviously, the more complete service of the motor carrier-"forwarder" would be far more attractive to shippers. Moreover, because of the forwarder's unique dual status of carrier and shipper, forwarders are pro-

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[13] Plan III TOFC service involves ramp-to-ramp rates based on a flat charge, regardless of the contents of trailers or containers, usually owned or leased by freight forwarders or shippers. No pickup or delivery is performed by the railroad.

[14] In Plan II TOFC operations, the railroad performs a door-to-door transportation service utilizing its own trailers or containers.

[14] Modified Plan II TOFC service, sometimes referred to as Plan 2½, may involve rail pickup at origin but shipper delivery of the railroad trailer or container at destination, or shipper delivery of the railroad trailer or container to the TOFC loading ramp and rail carrier delivery to the consignee.

[15] In Plan IV TOFC operations, the shipper or forwarder furnishes a trailer or container-loaded flatcar, either owned or leased. The railroad makes a flat charge for loaded or empty-car movement, furnishing only power and rails.

hibited from making through route and joint-rate arrangements with other common carriers. *Acme Fast Freight, Inc.* v. *United States*, 309 U. S. 638 (1940). The motor carrier's "forwarding" operations under Rule 2 would not be similarly restricted. In short, Rule 2 would confer upon motor carriers all of the advantages flowing from the forwarder's status as a shipper but would impose none of the correlative disadvantages set forth in Part IV of the act.

No doubt the motor carrier industry would be pleased to capture the traffic presently being moved by freight forwarders. To the credit of the industry, however, it does not desire to capture that traffic in the manner proposed by the Commission.

At no stage of this proceeding were the parties advised that the Commission would consider any type of compulsory open-tariff TOFC service involving Plan II rates and charges.[16] However, Rule 2 encompasses Plan II TOFC service. Numerous motor carriers will be in a position to demand that railroads pick up freight at motor carrier terminals, load it, transport it, and deliver it to consignees on the same terms that such freight is handled for shippers. Such service will probably not be demanded except for freight which is difficult to handle or which moves at depressed rates.

Apparently, Rule 2 was drafted primarily with a view toward compelling rail carriers to make Plan III TOFC rates available to motor carriers. The rule reflects the superficial notion that since the physical service performed for motor carriers and shippers is the same, rail carriers are arbitrary in refusing to provide the service at a uniform charge. The Commission, I think, has confused its cost

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[16] In the Commission's Notice of Oral Argument, dated November 8, 1963, the parties were requested to comment on whether "all ramp-to-ramp TOFC service should be provided at the same published rate or charge * * *". Plan II is not a ramp-to-ramp TOFC service.

standards for judging the minimum reasonableness of rates with the broader considerations involved in the establishment of rates by carrier management.

In establishing Plan III TOFC rates to meet the needs of a particular shipper or shippers, rail management must consider such factors as regularity of movement, frequency of movement, shipper return loads, the feasibility of private carriage for the shipper, the prospects of obtaining from the shipper additional traffic, and the shipper's financial responsibility. Some or even all of these factors may be entirely different with respect to the traffic tendered from time to time by a host of motor carrier competitors. As a result, Plan I TOFC[17] charges may be either higher or lower than Plan III rates and charges depending upon whether the traffic of motor carriers or shippers makes the most favorable showing under the transportation factors enumerated above. And that is why rail charges for Plan I TOFC service vary as between motor carriers. The physical identity of the ramp-to-ramp service, which is all the majority can see, is but one of many factors that must be considered in carrier ratemaking.

There is no evidence in this record, however, that any railroad has arbitrarily refused to enter into joint intermodal service arrangements with any motor carrier on the same general terms and conditions applicable to the similar traffic of any other motor carrier. As indicated, Plan I TOFC charges are sometimes lower than Plan III rates. Thus, no need has been shown to protect motor carriers against "discrimination" by providing the ramp-to-ramp TOFC charges to them shall not exceed those assessed to shippers under Plan III open tariffs.

On the contrary, the record shows that rail and motor carriers have been able to negotiate, with increasing frequency, charges for Plan I TOFC service and divisions

[17] Plan I TOFC service is defined in note 9, *supra*.

of Plan V TOFC[18] rates that are tailored for the particular intermodal service involved. The huge success of these purely voluntary rail-motor arrangements is incontestable. It is attested by the dramatic growth of both Plan I and Plan V TOFC service.

The Commission concludes, without explanation, that the rail carriers' fears of a diminution of their inherent advantages is misplaced. I think their fears are justified. Plan III open-tariff TOFC rates will probably not be utilized by motor carriers to any considerable extent on traffic originating in the terminal area of the loading ramp and destined to the terminal area of the unloading ramp except to the extent necessary to divert traffic from freight forwarders. Rather, these rates will be used primarily as the middle leg of a movement from other origins to other destinations. It is both unconscionable and destructive of the rail carriers' inherent advantages to attach to rate adjustments for their patrons the peril of short-hauling and of additional competition between unknown origins and unknown destinations.

The effect of Rule 2 is to transform the voluntary and viable partnership between rail and motor carriers into a master-servant relationship. The servant, it should be noted, was the inventor of the better mousetrap. However, the Commission believes that the mousetrap should be placed to a considerable extent under the control of the inventor's foremost competitors. Again it is to the credit of the motor carrier industry that it does not seek transportation dominance by the method proposed by the Commission.

Shipper opposition to compulsory open-tariff TOFC service is easy to understand. The major threat to rail carriers posed by Rule 2 involves Plan III open-tariff rates.

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[18] Plan V TOFC service is that performed under published joint rail-motor rates over through routes with certificated motor common carriers.

Apparently, a majority of these rates are lower than rail charges for Plan I TOFC service.[19] In some instances it may be possible for rail carriers to minimize the threat to their revenues by increasing Plan III rates and charges to the level of Plan I charges. In other instances, the threat might be reduced by cancelling Plan III TOFC rates and requiring shippers to use Plan II TOFC service. Plan II rates and service may not be so well-suited to the shippers' needs but the open tariffs under which Plan II service is performed are less usable by motor carriers.

It seems to me, however, that the trucking industry stands to lose as much as rail carriers and shippers. In the long run, the combination of intermodal competition and private carriage will compel rail carriers to perform Plan III TOFC operations on a very substantial scale. Rule 2, however, destroys the rate floor for such operations. Whether or not the motor carrier beneficiaries of reduced Plan III rates and charges have standing to protest is beside the point. They will have little or no incentive to do so. In this connection, the following testimony of the witness for the American Trucking Associations, Inc., in opposition to open tariff TOFC legislation merits serious consideration:

> While we strongly endorse this objective, the proposal itself is seriously defective. Modern piggyback service which is the innovation responsible for this recommendation involves some rather complex and complicated carrier-shipper relationships. It is far easier to recognize a need for broadened use of the service than to enunciate a proper solution of the problem created. Among other things to be considered is the maintenance of carriers as carriers and not to dilute their position by forcing them into a behavior pattern which is basically shipper oriented. We

[19] A serious deficiency in the record and in the Commission's report is the lack of information respecting the general levels of Plan I and Plan III TOFC charges. For that reason, only rough approximations can be made as to impact of Rule 2 on carriers and shippers.

earnestly desire an answer to this problem, but we feel that the solution should be one which treats carriers as carriers.

The Commission knows, of course, that motor common carriers also publish open tariffs. For many years, they have published tariffs in which they undertake to provide the motive power for hauling trailers owned or leased by shippers. More recently, they have published such tariffs in order to provide shippers a terminal-to-terminal service corresponding to the rail carriers' ramp-to-ramp TOFC service. *E.g., Automobile Parts and Other Articles, Central Territory,* 316 I.C.C. 143; *Powdered Iron, Camden and Pennsauken, N. J., to Dayton,* 321 I.C.C. 499. I should imagine that in the first appropriate proceeding, the Commission will find that one motor carrier, under conditions similar to those set forth in Rule 3, must be accorded the right to use the open tariffs of another motor carrier. Since the Commission in this proceeding has compelled rail carriers to deal with motor carriers they deem to be unreliable, the Commission can hardly decline to compel motor carriers to perform open tariff service for their undesirable brethren. Thus, the Commission's compulsory open-tariff concept, grounded on the false premise that carriers and shippers are two peas in a pod, can be used to establish in a limited way mandatory through routes and joint rates between motor carriers. The establishment of such through routes and joint rates is the subject of legislative recommendations made to the Congress in our last three annual reports, 75 I.C.C. Ann. Rep. 186 (1961); 76 I.C.C. Ann. Rep. 201 (1962); 77 I.C.C. Ann. Rep. 19 (1963).

Another threat to the motor common carrier industry arises from the fact that open-tariff TOFC service is not in fact substituted rail-for-motor service. True, the Commission has decked out open-tariff TOFC service in the trappings of substituted service. But if, as the Commission

[10] *Hearings on H. R. 4701, op. cit. supra.* note 6 at 212 (sic).

contends, the open tariff rate is not a joint rate, and if the motor carrier is really a shipper, the circuity limitations imposed by Rule 5 are illogical and arbitrary. That is, if the traffic which moves under an open tariff moves solely on the rail rate, the requirement of underlying motor carrier authority cannot be defended on any logical ground.

In my comments thus far on Rule 2, I have assumed that the rule does not require Plan I TOFC charges and Plan III open-tariff rates to be the same where the same ramp-to-ramp service is involved. In other words, I have attempted to estimate the *minimum* impact of the rule. Rule 2 is ambiguous. It seems to me, however, that the more natural construction is that all ramp-to-ramp TOFC service, Plan I as well as Plan III, must be performed at the same charge where the same physical service is involved. This construction, of course, leads to results which are more pernicious than I have indicated.

The most natural construction of Rule 2 is that the first two words, "TOFC service," are generic and are not qualified by the succeeding phrase set off in commas. Thus, if any ramp-to-ramp TOFC service is offered in an open-tariff publication, then all ramp-to-ramp TOFC service, Plan I as well as Plan III, "shall be made available at a charge no greater and no less than that received from any other person * * *."

I shall not attempt to depict the revolution in transport regulation that would result from construing the word "person," wherever it appears or is implied in the Interstate Commerce Act, to include carriers as well as shippers. Nevertheless, it is not idle to speculate upon the consequences of permitting rail carriers, in their capacity as shippers, to use the open tariffs of other railroads to avoid divisional agreements thought to be unfavorable, or upon the consequences of granting to railroads free access to all motor carrier open tariffs. Further speculation might begin with the most spectacular use of the open tariff priv-

ilege. I refer to Jay Gould's shipments of cattle over the lines of the New York Central.

Rule 4 is confusing because of the Commission's antipathy toward the use of TOFC plan numbers. The examiners, on the other hand, recognized that a clear differentiation of Plan I and Plan V TOFC service required the use of those numbers in the rules prescribed. By avoiding the numbers, the Commission blurs the differences between the two types of intermodal TOFC service. Such a blurring apparently was felt to be necessary in order to overcome the freight forwarders' argument that Plan I TOFC service, unlike Plan V, is not a through route, joint-rate arrangement and is, therefore, unlawful.

Recognition of the marked differences between Plan I and Plan V TOFC service may lead to the conclusion that the former does not involve through routes and joint rates. The major differences are three in number. First, under Plan V, but not under Plan I, a motor carrier may hold itself out to perform service jointly with a rail carrier to points beyond the scope of its operating authority. Secondly, the flat charges per trailer involved in Plan I TOFC service bear little or no resemblance to divisions of joint rates such as those involved in Plan V service. And finally, the rail carrier participating in Plan I TOFC service, unlike the rail carrier participating in Plan V, does not know the identity of the shipper or the contents of the trailer tendered by the motor carrier.

If the above-described differences mean that Plan I TOFC service does not involve through routes and joint rates—and it most certainly does not in any conventional sense—I would still have no difficulty in finding Plan I TOFC service to be lawful. In other words, if necessary, I would follow the rationale of the Commission's recent decision in *National Auto. Transporters Assn.—Declaratory Order*, 91 M.C.C. 395. However, I would not, either in Rule 3 or Rule 4, interject into transportation law such

nebulous phrases as "in lieu of" and "in addition to" in lieu of or in addition to such well-understood terms as Plan I TOFC service and Plan V TOFC service. A good example of the resulting confusion is the Commission's repudiation in its report of the rationale of the decision in *Rubber Articles, Philadelphia to Ill., Ky., Mich. and Mo.*, 319 I.C.C. 632, and the Commission's failure to indicate clearly in Rule 4(e) whether the result reached in that case is or is not sound.

Rule 4(d) produces a result that is absurd. The problem may best be illustrated by the following example. Let us suppose that Motor Carrier A, common or contract, is authorized to transport widgets from Chicago, Ill., to all points in Florida over irregular routes serving no intermediate points. Carrier A desires to participate in Plan I TOFC service by transporting the widgets to Cincinnati over the highway, transferring the trailer to Rail Carrier B at Cincinnati for movement in TOFC service to Atlanta, and receiving the trailer back at Atlanta for movement over the highway to destinations in Florida.

Although Carrier A is authorized to operate over highway routes paralleling the rail line of Carrier B from Cincinnati to Atlanta, and although Carrier A does not desire to pick up or deliver widgets from or to customers at either Cincinnati or Atlanta, Rule 4(d) would require Carrier A to obtain motor carrier operating authority in order to move its trailers *by rail* from Cincinnati to Atlanta. Obviously, no new motor carrier service would be created either at Cincinnati or at Atlanta. As indicated, Carrier A already holds operating authority to transport widgets over direct highway routes between Cincinnati and Atlanta. It is inconceivable that any other carrier, rail or motor, could be injured by Carrier A's substitution of rail for motor service for the movement between Cincinnati and Atlanta. This is how the Commission explains the absurdity:

It is our opinion, however, that the facts of record in this proceeding do not warrant any departure from the long-established practice of this Commission prohibiting a motor carrier from interchanging traffic at points other than its authorized service points. *Gilbert Carrier Corp. Extension —Kearney, N. J.*, 72 M.C.C. 204.

The statement cannot be accepted as true. The *Gilbert* case is not a long-established precedent. In fact, the *Gilbert* case was overlooked *sub silentio* in *National Auto. Transporters Assn.—Declaratory Order, supra.* Moreover, the *NATA* case was an entire Commission decision, whereas the *Gilbert* case was a report of division 1. The issue was fully briefed in the *NATA* case, but the *Gilbert* case was a "fluke" arising out of an unopposed application in which the issue involved was neither briefed nor discussed. And finally, no case clearly presenting the issue was decided between or after the Gilbert and *NATA* cases.[21]

Even if Plan I TOFC service is treated as a through route and joint-rate arrangement, it is so different from Plan V that the Commission need not fasten upon the former the common point of service requirement. Contract carriers would thereby be permitted to participate in joint intermodal TOFC service. As indicated, no carrier can derive any benefit from the requirement. If the requirement were not imposed, the Commission would be furthering its stated purpose of fostering the growth of TOFC service.

But if motor carriers in the position of Carrier A in the example above are going to be required to obtain operating authority, a way must be found to distinguish the certificates issued to them from those issued in response to a public need shown for service over the highway. I suggest that the certificates to be issued might be

[21] But see *Houff Transfer, Inc., Ext.—Staunton*, 92 M.C.C. 702, 704-5 (1963) (concurring opinion).

called griffin certificates in recognition of their grotesque and hybrid character.[22]

Rule 4(d), insofar as it relates to Plan I TOFC service, is required by no law except Parkinson's.

Commissioner Hutchinson in his separate expression has pointed to certain practical difficulties in the enforcement of Rule 5 and has suggested that a percentage limitation on circuity may not be the proper answer to the problem. I am in general agreement with those observations. Nevertheless, I would be willing to approve Rule 5 on an experimental basis were it not for the majority's retroactive and harsh application of the rule.

The examiners recommended that the circuity limitation rule operate only prospectively. They were concerned, and rightly so, by the fact that numerous motor carriers have participated for many years in TOFC operations which do not conform to the new circuity rule. However, no carriers or shippers have complained about these operations and rates applicable thereto have been permitted to go into effect. At the very least, the Commission should have found that such operations are *prima facie* lawful.

Instead, on and after the effective date of the Commission's order, numerous TOFC operations, not heretofore challenged by anyone, will automatically become unlawful. Each day of continued operations will build up a record of "unfitness." But because the operations have served a public need over a long period of time, immediate discontinuance of such operations may entail severe financial losses for the motor carriers involved.

Throughout its report, the majority says again and again that the expansion of TOFC service is its primary aim. I do not understand its refusal to further that objective with a small dispensation of mercy.

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[22] The griffin, in Greek mythology, was a fabulous monster, usually having the head and wings of an eagle and the body of a lion.

Rule 7(a), although containing much of the language of the examiners' rule, is far from the relatively harmless provision recommended. Far reaching language not considered by the parties has been injected. The leasing provisions, in the form recommended by the examiners, lacked any requirement for publication of the leasing charges of rail affiliates and subsidiaries, and would have been ineffective. Realizing this, the majority has simply added language which includes affiliates. However, the provision which the majority uses to close the loopholes is both unlawful and inequitable.

To begin with, the Commission possesses no authority over the rates and charges of non-carriers. Of course, the separate corporate entities involved could be disregarded if it could be shown that the Commission was being frustrated in its efforts to put down widespread, clearly established transportation abuses, and that these abuses persisted by virtue of the separate identities of rail carrier subsidiaries. *Cf. Schenley Corp.* v. *United States,* 326 U. S. 432 (1946). However, the record in this proceeding falls far short of such a showing. Generalized allegations of abuses were not buttressed with actual shipper complaints. The real abuses are yet to come, and they will come primarily from the rule itself.

The effect of Rule 7(a) will be to promote leasing by non-regulated companies, including motor carrier affiliates and subsidiaries. The non-regulated leasing companies will be able to undercut the published leasing charges of rail carriers and the latter will be unable to respond promptly. One side effect of the rule will be to jeopardize the New York Central's $16,700,000 investment in Flexivan equipment. Although other railroads can handle conventional equipment leased to shippers by non-regulated concerns, the Central will be faced with the necessity of making a costly adjustment in its TOFC operations.

It may be that with the record herein so barren on the subject, the majority feels that the Commission requires

information about carrier leasing practices and charges. If so, this need could have been met in a less disruptive manner by merely requiring the carriers to file their master lease agreements.

In conclusion, this proceeding demonstrates the danger of attempting to solidify and to mechanize the law on a subject as fluid as piggybacking. A code of rules is appropriate for motor carrier safety regulation and for other transportation subjects which are fairly static in nature. But the problems rising from the turbulent arena of intermodal competition cannot be obviated by economic planning, or jammed into hard and fast policy molds, or resolved by the writing of ordinances. Such problems can be solved fairly and intelligently only by a form of case-by-case adjudication which reflects the spirit and the genius of the common law. If this is not so, the Commission should institute immediately an ex parte proceeding to lay down, through formal rules, policy guidelines for the interpretation and application of section 15(a)(3) of the act in intermodal competitive rate controversies.

I would promulgate no rules in this proceeding.

APPENDIX I

Parties filing exceptions or replies

A. Parties filing both exceptions and replies:

1. The Eastern Railroads.
2. Class I Railroads of the Western District except the Illinois Central and the Gulf Mobile and Ohio Railroads (Western Railroads).[1]
3. Railroads operating in the Southern Freight Association Territory except the Southern Railway System and the St. Louis-San Francisco Railway Company (Southern Railroads).
4. New York Central Railroad Company.
5. Southern Railway System.
6. American Trucking Associations, Inc., and a number of affiliated associations and member motor carriers (A.T.A.).
7. National Automobile Transporters Association.
8. Freight Forwarders Institute and a number of individual freight forwarders.
9. Seatrain Lines, Inc.
10. National Industrial Traffic League (NITL).
11. Bureau of Inquiry and Compliance, Interstate Commerce Commission.

B. Parties filing exceptions only:

1. Contract Carrier Conference of American Trucking Associations, Inc.
2. Local and Short Haul Carriers National Conference.
3. Wisconsin Motor Carriers Association.[2]
4. Clipper Carloading Company.
5. Growers and Shippers League of Florida, Florida Citrus Commission, Florida Canners Association, Florida Citrus Mutual, and Florida Fruit and Vegetable Association (Florida Shippers).

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[1] Where it is deemed necessary, the name of a party is followed by an appropriate short title, in parentheses, by which it is designated in the report.

[2] The exceptions of the Wisconsin Motor Carriers Association were late filed, but were accepted as a petition for reconsideration and have been considered.

6. John Morrell & Company, The Rath Packing Company, Geo. A. Hormel & Company, and Oscar Mayer & Company.

C. Parties filing replies to exceptions only:

1. Illinois Central Railroad Company.
2. Private Carrier Conference, Inc.
3. The Motor Convoy, Inc., and Motor Convoy Company.
4. Transamerican Freight Lines, Inc.
5. Manufacturing Chemists Association, Inc.
6. Acme Steel Company and 13 other interested shippers.
7. United States Department of Defense.

APPENDIX II

Proposed TOFC rules distributed at the prehearing conference October 9, 1962

A. Definitions.

1. "Trailer-on-flatcar (TOFC) service" means the transportation, in interstate or foreign commerce, of any freight-laden highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semi-trailer having a demountable chassis) on a rail car, and/or the return transportation, in interstate or foreign commerce, of any empty highway truck, trailer, or semitrailer (or the demountable container portion thereof) on a rail car.

2. "Joint intermodal TOFC service" means any transportation of property (the motor and/or water transportation of which is subject to economic regulation under the Interstate Commerce Act) jointly provided by a railroad or railroads subject to part I of the act and a motor common carrier or carriers subject to part II of the act or a water common carrier or carriers subject to part III of the act, and which includes for the whole[1] or any part of the line-haul movement, the peformance of TOFC service as defined in (1) above; except that the term "joint intermodal TOFC service" does not include the transportation of property moving under contract rates as set forth in section 409 of the act.

[1] See rule B-7 below.

3. "All-rail TOFC service" means any transportation, other than transportation embraced in (2) above, provided by a railroad or railroads subject to Part I of the act, which transportation includes the performance of TOFC service as defined in (1) above.

B. Rules governing joint intermodal TOFC service.

1. Tariffs embracing joint intermodal TOFC rates or charges shall set forth the service covered by the published rates or charges, the routes over which such service will be performed, and the names of the carriers participating therein.

2. Tariffs embracing joint intermodal TOFC rates or charges may be published only by rail, motor, or water common carriers, or their agents, on commodities subject to economic regulation throughout their entire movement, and shall show appropriate concurrences of all carriers participating in the movement.

3. Motor carriers shall not participate in joint intermodal TOFC service which is to be provided in lieu of their authorized over-the-road service where the combined distance from origin to destination over the intermodal route is less than 90 percent of the distance between such points over the motor carrier's authorized highway route, except as may be permitted by the Commission upon consideration of an appropriate application filed by the motor carrier in which it seeks relief from the percentage provisions of this section. [Example: In connection with a shipment originating at A and destined to D, a motor common carrier holding authority to transport such shipment from A to D (a distance of 300 miles by its authorized highway routes), serving the intermediate points of B and C, participates in joint intermodal TOFC service in lieu of its authorized over-the-road service in the following manner: The shipment is transported from A to B by the motor carrier over its authorized highway route (a distance of 100 miles), at which point it is placed on a rail car for TOFC movement to C (a distance of 80 miles over the rail route used as compared to 100 miles over the motor carrier's authorized highway route), and at C the shipment is returned to the originating motor carrier for ultimate delivery at D (a distance of 100 miles over the motor carrier's authorized highway route). Although

the rail line distance (80 miles), between B and C is less than 90 percent of the motor carrier's authorized highway route between the same points (100 miles), the above rule allows this operation inasmuch as the combined motor-rail-motor route between A and D (280 miles) is more than 90 percent of the motor carrier's authorized highway route (300 miles) between A and D.]

4. The railroad or railroads providing TOFC service jointly with motor or water common carriers shall receive no greater compensation or charge for its or their portion of the total intermodal movement than it or they would receive under any all-rail TOFC terminal-to-terminal rates or charges maintained for like service between the same points.

5. Any railroad which provides TOFC service jointly with any motor or water common carrier shall not refuse to enter into a like arrangement with other motor or water common carriers under similar circumstances and conditions, except that such railroad shall have the duty of ascertaining whether the connecting motor or water carriers hold appropriate authority to transport the involved commodities. If the connecting motor or water carriers do not hold such authority, no joint intermodal TOFC service shall be performed with respect thereto.

6. The billing carrier participating in joint intermodal TOFC service may refuse to reveal the indentities of the shippers or consignees to its connecting carriers, in which event the billing carrier shall assume, with respect to the shippers or freight forwarders, full responsibility for the complete movement.

7. Tariffs embracing joint intermodal TOFC rates or charges may provide for TOFC service for the entire line-haul movement. [Note: Although this rule is in apparent conflict with Commission decisions in *Substituted Freight Service*, 232 I.C.C. 683, and *Interchange of Traffic at Point of Origin*, 46 M.C.C. 623, it is intended to represent what appears to be a widespread practice under present plan I operations.]

8. Carrier's participating in joint intermodal TOFC service shall interchange traffic only at a common point of service.

9. Notwithstanding its participation in joint intermodal TOFC service, a motor or water common carrier shall con-

tinue to render reasonably adequate and continuous transportation service at all points authorized to be served by it.

10. A rail, motor, or water common carrier participating in joint intermodal TOFC service shall not act as the agent of a shipper or freight forwarder in arranging for transportation by other carriers subject to the Interstate Commerce Act without providing therefor in tariffs filed with the Commission.

11. Railroads participating in joint intermodal TOFC service shall assume full responsibility for the safe loading and securing of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) on rail cars and for unloading them from rail cars.

C. Rules governing all-rail TOFC service.

1. Rates or charges for all-rail TOFC line-haul service, and for any transportation or auxiliary service in connection with all-rail TOFC service, shall be provided for in tariffs published, posted, and filed by a railroad or its agent, in either of the following ways:

(*a*) Publish rates or charges which specifically include pickup from shipper and/or delivery to consignee by the railroad or railroads.

(*b*) Publish rates or charges which are limited specifically to apply only from and/or to designated railroad terminals when all service and equipment is provided by the railroad.

2. (*a*) Each carrier performing or holding out to perform all-rail TOFC service shall publish, post, and file tariffs (by itself or through an agent) which shall contain in clear and explicit terms all of the rates and charges for and rules governing storage, demurrage, detention of highway vehicles, cartage, switching, floating, literage, wharfage, weighing, diversion, reconsignment, icing, refrigeration, heat, c.o.d. services, transit services, absorptions, allowances, and other special or accessorial services or practices, and an explicit statement of all other charges and rules which in any way increase or decrease the amount to be paid on any shipment or which increase or decrease the value of the service to the shipper.

(*b*) All tariffs containing rates for the all-rail TOFC transportation of property shall specify whether such rates do or do not include pickup or delivery services.

(*c*) When charges for pickup or delivery service are in addition to line-haul TOFC transportation charges, they shall be published in tariffs as provided in paragraph (*a*) of this rule.

(*d*) The area within which pickup or delivery service will be performed shall be described specifically and the description published in clear and explicit terms in tariffs as provided in paragraph (*a*) of this rule. It will be sufficient to state that pickup and delivery service will be performed at all places or locations within the limits of the incorporated cities, towns, or villages, from, to, or between which the rates apply, if that is the only application intended. It is not permissible to refer to decisions of the Commission for the description nor to state that the area within which pickup and delivery service will be performed is that defined by the Commission in a formal proceeding.

(*e*) All tariffs containing rates for the all-rail TOFC transportation of property shall specify the extent to which such rates do or do not include the loading and unloading of the property from the highway vehicle by the carrier (including the number of laborers to be used). When charges in addition to the line-haul TOFC transportation charges or in addition to pickup or delivery charges, if any, are made for the loading or unloading of property, they shall be published in tariffs as provided in paragraph (*a*) of this rule.

(*f*) If the shipper, freight forwarder, and/or consignee directly or indirectly renders any service connected with such transportation (such as ramping, deramping, and tiedown of trailers on cars), or furnishes any equipment or other instrumentality used therein (such as a trailer, semitrailer or car), the charge or allowance paid to the shipper, freight forwarder, and/or consignee therefor shall be published as provided in paragraph (*a*) of this rule.

3. Railroads or persons under common control with railroads shall not for use in TOFC service lease, directly or indirectly, highway trucks, trailers, or semitrailers, and/or rail cars, to or from shippers or freight forwarders.

4. A railroad providing all-rail TOFC service shall not act as the agent of a shipper or freight forwarder in ar-

ranging for transportation by other carriers subject to the Interstate Commerce Act without providing therefor in tariffs filed with the Commission.

5. Railroads providing all-rail TOFC service shall assume full responsibility for the safe loading and securing of highway trucks, trailers or semitrailers (or the demountable container portion thereof) on rail cars and for unloading them from rail cars.

6. Highway vehicles and/or rail cars provided by shippers or freight forwarders in connection with all-rail TOFC service, while on railroad premises, shall be subject to the storage and/or demurrage rules, regulations, and charges provided for in rule C-2 above.

7. The handling by a railroad of a motor or water carrier's trailer, empty or loaded with commodities the motor and/or water transportation of which is not subject to economic regulation under the Interstate Commerce Act, is permissible under all-rail TOFC tariffs.

D. Billing and notification rules.

1. No shipment shall be transported in or in connection with TOFC service until the origin carrier has issued a bill of lading therefor and received from the shipper or freight forwarder any manifest used in connection therewith.

2. Certification as to the weight and contents of a highway truck, trailer, or semitrailer (or the demountable container portion thereof) shall be made by the shippers or carriers at the time of its tender to a railroad or connecting carrier.

3. Unless otherwise provided for and made available to other shippers and carriers, two or more highway trucks, trailers, or semitrailers (or demountable container portions thereof) shall be tendered on the same day in order to qualify for a rate for the movement of multiple highway vehicles (or the demountable container portions thereof).

4. Arrangements for the movement of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) containing explosives or other dangerous articles shall be made by a shipper or carrier with a railroad in sufficient time to permit the latter properly to placard and position the rail cars used for the movement.

5. All-freight (all-commodity) rates that are restricted to apply only when not more than a designated percent of the shipment consists of one article or commodity shall be made subject to the following tariff provision:

Rates subject hereto apply only when shipper certifies on shipping order and bill of lading at time of shipment as follows:

"Not more than——percent of the articles (or commodities) in this shipment consists of an article or articles embraced by the commodity description of a single item of the current Uniform Freight Classification."

If the certificate has not been signed at the time when the bill of lading is issued such all-freight (all-commodity) rates do not apply; and the applicable rate on the shipment will be————————.

[In the blank space there must be inserted a specific statement of the rate or charge that will apply, such as, for example: "the class 45 rate applicable over the route of movement subject to a minimum weight of 30,000 pounds."]

APPENDIX III

The hearing examiners' recommended rules

1. "Trailer-on-flatcar (TOFC) service" means the transportation, in interstate or foreign commerce, of any freight-laden or empty highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer or semitrailer having a demountable chassis) on a rail car.

2. "Plan I TOFC service" is service performed by a railroad in substitution for motor common carrier service to, from, and between named points over the motor carrier's route, at the option of the motor carrier, unless otherwise directed by the shipper, the traffic moving from initial origin to final destination at all-motor rates and on motor carrier bills of lading under an arrangement or an agreement between the two modes of transportation.

3. "Plan V TOFC service" is that performed under published joint rail-motor rates over through routes with certificated motor common carriers.

4. "Joint intermodal TOFC service" includes Plan I and Plan V TOFC services as defined above.

5. "All-rail TOFC service" means any transportation, other than transportation embraced in Plans I and V above, provided by a railroad or railroads subject to Part I of the Interstate Commerce Act, which transportation includes the performance of TOFC service.

6. Tariffs embracing joint intermodal TOFC rates or charges, or Substituted Service Directories, if used, shall set forth the service covered by the published rates or charges; the routes over which such service will be performed or the origin, destination, points of interchange between modes of transportation and rail routes; and the names of the carriers participating therein.

7. Tariffs setting forth rates or charges for joint intermodal TOFC transportation may be published only by rail, motor, or water common carriers, or their agents, on commodities the transportation of which is subject to economic regulation throughout their entire movement, and shall show appropriate concurrences of all carriers participating in the movement.

8A. Motor common carriers shall not participate in Plan I TOFC service which is to be provided in lieu of their authorized over-the-road service where the combined distance from origin to destination over the intermodal route is less than 85 percent of the distance between such points computed (1) if a regular-route carrier, over its authorized regular route, or (2) if an irregular-route carrier, through any gateway point which it is required to use; except as may be permitted by the Interstate Commerce Commission upon consideration of an appropriate application filed by a motor common carrier or a railroad in which relief is sought from the percentage provisions of this rule.

8B. Motor common carriers participating in Plan I TOFC service which comes within the 85-percent circuity provision provided in part (A) of this rule, shall file with the Interstate Commerce Commission, on the same date that tariffs or substituted service directories are filed, information showing the name of the rail carrier to be

used, the total mileage from origin to destination over its all-motor route, the points between which TOFC service of the rail carrier is to be used, and the total mileage from origin to destination over the joint motor-rail-motor route to be used.

9. Any railroad or railroads may provide TOFC service jointly with any motor or water common carriers, *provided* that the common carriers by railroad, motor, and/or water shall have the duty of ascertaining whether it or its connecting common carrier hold appropriate authority from the Interstate Commerce Commission to render the service contemplated before the effective date of such joint arrangements. If the origin or connecting common carriers do not hold such authority, no joint intermodal TOFC service shall be performed with respect thereto.

10. Tariffs providing for Plan I TOFC rates or charges, or Substituted Service Directories, if used, may provide for plan I TOFC service for the entire line-haul movement, *except* to the extent such service may be prohibited under rule 8A above.

11. Carriers participating in joint intermodal TOFC service shall interchange traffic only at a common point of service.

12A. Railroads participating in TOFC service shall assume responsibility for the safe securing of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) on the rail cars when moving over their lines; and, unless otherwise provided for by tariff or agreement between the parties, shall also assume responsibility for the safe placing of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) on rail cars and for removing them from rail cars.

12B. Railroads participating in TOFC service have the right to refuse to accept for transportation in such service any highway trucks, trailers, or semitrailers (or the demountable container portion thereof) which do not conform to the motor carrier safety regulations prescribed by the Interstate Commerce Commission.

13. No allowance shall be payable to any shipper, freight forwarder, and/or consignee which renders any service or furnishes any instrumentality in connection with TOFC service unless: (1) such service or instrumentality is

the obligation of the carrier under the applicable rate designated by the shipper, and (2) the amount of the allowance is published in tariffs on file with the Interstate Commerce Commission.

14. Each railroad performing, or holding itself out to perform, TOFC service shall publish, post, and file tariffs (by itself or through an agent) which shall contain in clear and explicit terms all of the rates and charges for and the rules governing the leasing of equipment to or from shippers, freight forwarders, and/or consignees and other special or accessorial services or practices, including charges for pickup and/or delivery service when such charges are in addition to line-haul transportation charges.

15. The area within which pickup or delivery service will be performed shall be described specifically and the description published in clear and explicit terms in the tariff. It is not permissible to refer to decisions of the Interstate Commerce Commission for the description nor to state that the area within which pickup and delivery service will be performed is that defined by the Interstate Commerce Commission in a formal proceeding.

16. All rail tariffs containing rates for TOFC transportation of property shall specify the extent to which such rates do or do not include the loading and unloading of property from or to the highway vehicle by the carrier. When charges in addition to the line-haul TOFC transportation charges or in addition to pickup or delivery charges, if any, are made for the loading or unloading of property, they shall be published in appropriate tariffs and filed with the Interstate Commerce Commission.

17. Highway vehicles and/or rail cars provided by shippers or freight forwarders in connection with all-rail TOFC service, while on railroad premises, shall be subject to the storage and/or demurrage rules, regulations, and charges published in tariffs on file with the Interstate Commerce Commission.

18. The handling by a railroad of a motor or water carrier's trailer, loaded with commodities the motor transportation of which is not subject to economic regulation under the Interstate Commerce Act, is permissible only under all-rail TOFC tariffs.

19. No shipment shall be transported in or in connection with TOFC service until the originating carrier has issued

a receipt or bill of lading therefor, and where a manifest is used by the shipper or freight forwarder, such manifest shall be delivered to the originating carrier not later than 24 hours after the shipment reaches the destination ramp.

20A. Certification as to the weight of a highway truck, trailer, semitrailer (or demountable container portion thereof) shall be made by the shipper at the time of its tender to the originating carrier.

20B. Shippers shall certify at the time of tendering a shipment to the originating carrier, whether or not the contents of a highway truck, trailer, or semitrailer (or the demountable container portion thereof) consists of (1) any commodity which is prohibited from movement in TOFC service by the carrier's tariff, and (2) explosives or other dangerous articles.

21. In order to qualify for a rate applicable on the movement of multiple highway vehicles (or the demountable container portion thereof), two or more highway trucks, trailers, or semitrailers (or the demountable container portions thereof) shall be tendered to the carrier within the time period, not to exceed one calendar day, specified in tariffs on file with the Interstate Commerce Commission.

22. Arrangements for the movement of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) containing explosives or other dangerous articles shall be made by a shipper or carrier with a railroad in sufficient time to permit the latter properly to placard and position the rail car used for the movement; *except* that shipments containing explosives or other dangerous articles shall *not* be transported in TOFC service unless the shipper, at the time of tender to the originating carrier, certifies that the shipment complies with the Interstate Commerce Commission's regulations governing explosives and other dangerous articles as described in 49 C.F.R. 71-78.

23. All freight (all commodity) rates that are restricted to apply only when not more than a designated percent of the weight of the shipment consists of one article shall be made subject to tariff provisions describing in clear and explicit terms the conditions under which such rates apply.

APPENDIX IV

49 CFR 500. *Practices of for-hire carriers participating in trailer-on-flatcar service*

500.1 *Definition of TOFC service.*—Trailer-on-flatcar (TOFC) service means the transportation on a rail car, in interstate or foreign commerce, of (*a*) any freight-laden highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis); or (*b*) any empty highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis) when such empty equipment is being transported incidental to its prior or subsequent use in TOFC service as defined in subparagraph (*a*) of this section.

500.2 *Availability to all of TOFC service.*—TOFC service, if offered by a rail carrier through its open tariff publications, shall be made available to any person at a charge no greater and no less than that received from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

500.3 *Use of open-tariff TOFC service by motor and water carriers in the performance of economically regulated transportation.*—

(*a*) Except as otherwise may be prohibited by these rules, motor common and contract carriers, water common and contract carriers, and freight forwarders may utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier.

(*b*) Motor and water common carriers shall utilize open-tariff TOFC service only if their tariff publications give notice that such service may be utilized at their option, but that the right is reserved to the user of their services to direct that in any particular instance TOFC service not be utilized.

(*c*) Motor and water contract carriers shall utilize open-tariff TOFC service only if their transportation contracts and schedules make appropriate provision therefor.

(*d*) Tariffs of motor and water common carriers and contracts and schedules of motor and water contract carriers providing for the use of open-tariff TOFC service shall set forth the points between which TOFC service may be performed and the names of the rail carriers whose TOFC service may be utilized.

(*e*) Motor and water common and contract carriers utilizing open-tariff TOFC service in the performance of authorized transportation shall tender traffic to and receive traffic from rail carriers only at points which the motor and water carriers are authorized to serve.

500.4 *Joint intermodal TOFC service.*—

(*a*) Except as otherwise may be prohibited by these rules, any rail carrier or carriers subject to part I of the act may enter into through-route and joint-rate arrangements with any motor common carrier subject to part II of the act or any water common carrier subject to part III of the act, wherein TOFC service is to be provided either in lieu of, or in addition to, the authorized all-highway or all-water service of such motor or water common carrier.

(*b*) Motor or water common carriers may participate in joint intermodal TOFC service in lieu of their authorized all-highway or all-water service only if their tariff publications give notice that such service may be provided at their option, but that the right is reserved to the user of their services to direct that in any particular instance such TOFC service not be provided.

(*c*) Tariffs embracing joint intermodal TOFC rates or charges, including Substituted Service Directories, if used, shall set forth the service covered by the published rates or charges; the points of interchange between modes of transportation; and the names of the carriers participating therein.

(*d*) Carriers participating in joint intermodal TOFC service shall interchange traffic only at a common point of service.

(*e*) Where joint intermodal TOFC service is to be performed in lieu of a motor or water carrier's authorized all-highway or all-water route, tariffs embracing rates or charges covering such service may provide for the performance of TOFC service for the entire line-haul movement.

(*f*) Tariffs setting forth through rates or charges for joint intermodal TOFC transportation may be published only with respect to commodities the transportation of which is subject to economic regulation throughout the entire movement provided for in such tariffs.

500.5 *Circuity limitations.*—

(*a*) Motor and water common carriers shall not participate in joint intermodal TOFC service which is to be provided in lieu of their authorized line-haul transportation, and motor and water common and contract carriers shall not utilize open tariff TOFC service, where the distance from origin to destination over the route including the TOFC movement is less than 85 percent of the distance between such points over the motor or water carrier's authorized service route; *provided, however,* that the Interstate Commerce Commission may grant relief from the provisions of this paragraph upon consideration of an appropriate petition.

(*b*) For the purpose of paragraph (*a*) of this part the distance from origin to destination over the motor or water carrier's authorized route shall be computed (1) if a motor carrier operating over regular routes, over its authorized regular service route, (2) if a motor carrier operating over irregular or a combination of regular and irregular routes, through any gateway point which it is required to observe, and (3) if a water carrier, over the most direct available all-water route.

500.6 *Responsibility for placing and securing trailers.*—

(*a*) Railroads participating in TOFC service shall assume responsibility for the safe securing of highway trucks, trailers, or semitrailers (or the demountable container portions thereof) on the rail cars when moving over their lines; and, unless otherwise provided for by tariff, or in the case of connecting common carriers by agreement, railroads shall also assume responsibility for the safe placing of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) on rail cars and for removing them from rail cars.

(*b*) Railroads participating in TOFC service have the right to refuse to accept for transportation in such service any highway trucks, trailers, or semitrailers (or the demountable container portions thereof) which do not conform to the motor carrier safety regulations prescribed by the Commission.

Appendix B.

500.7 *Tariff publication regulations.*—

(*a*) Each railroad performing or holding out to perform TOFC service shall publish, post, and file tariffs (itself or through an agent) which shall contain in clear and explicit terms all of the rates and charges for and the rules governing the leasing of equipment to any person using its TOFC service (whether by the railroad itself or by any person affiliated with or controlled by the railroad or any agents of the railroad), and other special services or practices, including charges for pickup or delivery service when such charges are in addition to line-haul transportation charges. Such tariffs shall also contain, in clear and explicit terms, all amounts to be paid to any shipper for the lease of any empty truck, trailer, or semitrailer (or the container portion of any truck, trailer, or semitrailer having a demountable chassis) when such empty equipment is being transported incidentally to its prior or subsequent use in TOFC service.

(*b*) No allowance shall be payable by a rail carrier to any shipper, freight forwarder, or consignee which renders any service or furnishes any instrumentality in connection with TOFC service unless (1) such service or instrumentality is one that the rail carrier is obligated to perform or provide under the applicable rate and (2) the amount of the allowance is published in tariffs on file with the Interstate Commerce Commission.

(*c*) The area within which pickup and delivery service will be performed by a rail carrier offering to provide TOFC service shall be described specifically and the description published in clear and explicit terms in the tariff. It is not permissible to refer to decisions of the Commission for the description nor to state that the area within which pickup and delivery service will be performed is that defined by the Commission in a formal proceeding.

(*d*) All rail tariffs containing rates for TOFC transportation of property shall specify the extent to which such rates do or do not include the loading and unloading of property from or to the highway vehicle by the carrier. When charges in addition to the line-haul TOFC transportation charges or in addition to pickup or delivery charges, if any, are made for the loading or unloading of property, they shall be published in appropriate tariffs and filed with the Interstate Commerce Commission.

(*e*) Highway vehicles or rail cars provided by shippers or freight forwarders in connection with all-rail TOFC service, while on railroad premises, shall be subject to the storage or demurrage rules, regulations, and charges published in tariffs on file with the Interstate Commerce Commission.

500.8 *Billing and notification rules.*—

(*a*) No shipment shall be transported in or in connection with TOFC service until the originating carrier has issued a receipt or bill of lading therefor.

(*b*) Carriers by tariff publication shall require that where a manifest or a statement of the weight or nature of a TOFC shipment is needed to determine the TOFC freight charges, such manifest or a certification by the shipper as to the weight or the nature of the shipment shall be delivered to the originating carrier within 24 hours after the shipment reaches its destination; *provided, however,* that where the weight of a loaded highway truck, trailer, or semitrailer (or the demountable container portion thereof) or the weight of the contents thereof is needed to determine rail TOFC charges, the rail carrier shall not relinquish possession of the shipment until it has received certification from the shipper as to such weights or has itself ascertained them.

(*c*) Unless a rail carrier by appropriate tariff publication specifically provides otherwise, in clear and unequivocal terms, two or more highway trucks, trailers, or semitrailers (or the demountable container portions thereof) shall be tendered within one calendar day in order to qualify for any rate for the movement of multiple highway vehicles (or for the demountable container portions thereof).

(*d*) Carriers by tariff publication shall require that arrangements for the movement of highway trucks, trailers, or semitrailers (or the demountable container portions thereof) containing explosives or other dangerous articles shall be made by a shipper or carrier with a raiload in sufficient time to permit the latter properly to placard and position the rail cars used for the movement and that shipments containing explosives or other dangerous articles shall not be transported in TOFC service unless the shipper, at the time of tender to the originating carrier, certifies that the shipment complies with the Interstate

Commerce Commission's regulations governing explosives, and other dangerous articles as described in 49 CFR 71-78.

(*e*) All-freight (all-commodity) rates that are restricted to apply only when not more than a designated proportion of a shipment consists of a single article shall be made subject to tariff provisions which (1) shall describe in clear and explicit terms the conditions under which such rates apply, (2) shall contain or refer to a commodity classification, such as the current Uniform Freight Classification or a designated tariff, from which it can be determined what constitutes a "single article" for purposes of the all-freight rate, (3) shall require certification by the shipper of the percentage which the weight of a given article bears to the weight of the entire shipment, and (4) shall specify the means by which the applicable rate will be determined should a shipment fail to qualify for the all-freight rate because it contains more than the designated proportion of one article.

APPENDIX V

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TITLE 49 — TRANSPORTATION
CHAPTER 1 — INTERSTATE COMMERCE COMMISSION
SUBCHAPTER E — INTERMODAL TRANSPORTATION
PART 500 — PRACTICES OF FOR-HIRE CARRIERS OF PROPERTY PARTICIPATING IN TRAILER-ON-FLATCAR SERVICE

EX PARTE NO. 230

SUBSTITUTED SERVICE — CHARGES AND PRACTICES OF FOR-HIRE CARRIERS AND FREIGHT FORWARDERS
(Piggyback Service)

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION held at its office in Washington, D. C., on the 16th day of March A. D. 1964.

It appearing, That the Commission, by notice and order entered June 29, 1962, instituted the above-entitled proceeding under Parts I, II, III, and IV of the Interstate Commerce Act and section 4 of the Administrative Procedure Act for the purpose of investigating the manner and methods of performance and use of coordinated or substituted trailer-on-flatcar (piggyback) service; of ascertaining the desirability, feasibility, and lawfulness of the operational practices and facilities of rail, motor, and water carriers, freight forwarders, and express companies subject to the Interstate Commerce Act; and of determining what rules and regulations, if any, should be adopted;

It further appearing, That the said notice and order entered June 29, 1962, invited the participation of all interested parties to submit representations setting forth the extent of their participation in trailer-on-flatcar service and their practices connected therewith; and that notice to all interested parties was given through publication of the said notice in the Federal Register of July 7, 1962 (27 F. R. 6434);

It further appearing, That the Railroads Operating in the Southern Freight Association Territory, except the Southern Railway System and the St. Louis-San Francisco Railway Company, have included in their exceptions to the examiner's recommended order motions to strike certain portions of the verified statements of the Bureau of Inquiry and Compliance, Interstate Commerce Commission, and certain other parties, and also filed a request, on April 2, 1963, to cross-examine the Director of the Bureau of Inquiry and Compliance;

And it further appearing, That the Commission, on the date hereof, has made and filed its report on oral argument herein, setting forth its conclusions and findings and its reasons therefor, which report is hereby referred to and made a part hereof:

It is ordered, That the motions and request described in the third appearing paragraph hereof be, and they are hereby, denied for the reasons set forth in the said report;

It is further ordered, That title 49 CFR be, and it is hereby, amended by adding to chapter 1 thereof subchapter E, Intermodal Transportation, part 500, Practices of For-Hire Carriers of Property Participating in Trailer-on-flat-car Service, containing the regulations set forth in Appendix IV to the said report;

It is further ordered, That this order shall become effective on July 6, 1964, and shall remain in effect until modified or revoked in whole or in part by further order of the Commission.

And it is further ordered, That notice of this order shall be given to the general public by depositing a copy thereof in the office of the Secretary of the Interstate Commerce Commission, Washington, D. C., and by filing a copy with the Director, Office of the Federal Register.

[24 Stat. 383 as amended, 49 U.S.C. 12(1); 52 Stat. 1237, 49 U.S.C. 304(a)(6); 54 Stat. 933, 49 U.S.C. 904(a); 56 Stat. 285, 49 U.S.C. 1003(a); 60 Stat. 237, 5 U.S.C. 1003.]

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

APPENDIX C

National Transportation Policy, 49 U.S.C. preceding §§ 1, 301, 901, and 1001.

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Sec. 1(1)(a), 49 U.S.C. 1(1)(a):

"That the provisions of this part shall apply to common carriers engaged in—(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment;"

Appendix C.

Sec. 1(3)(a), 49 U.S.C. 1(3)(a):

"The term 'common carrier' as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word 'carrier' is used in this part it shall be held to mean 'common carrier'. The term 'railroad' as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons of property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term 'person' as used in this part includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof."

Sec. 1(4), 49 U.S.C. 1(4):

"It shall be the duty of every common carrier subject to this part to provide and furnish transportation

upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Sec. 6(1), 49 U.S.C. 6(1):

"That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and

passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part."

Section 10(e) of the Administrative Procedure Act, 5 U.S.C. 1009(e):

"SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsup-

ported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 909

THE NEW YORK CENTRAL RAILROAD COMPANY,
APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

Pursuant to Rule 16(c)(1) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that those portions of the judgment of the district court from which appellant is here appealing be affirmed.[1]

[1] Appellees, United States of America and Interstate Commerce Commission, are appellants in No. 924, *United States of America and Interstate Commerce Commission* v. *The Atchison, Topeka and Santa Fe Railway Company, et al.* (October Term, 1965, in which other portions of the district court's decision and judgment are being appealed. There are, however, no issues common to both cases (see p. 5, *infra*).

203-523—66

STATEMENT

This case concerns the validity of portions of an Interstate Commerce Commission regulation governing "TOFC" (trailer-on-flatcar) service, also known as piggyback—the movement of truck trailers on railroad flatcars. One of the most common arrangements under which TOFC service is offered to the shipping public is for the rail carrier (or an affiliate) to lease a trailer to the shipper, who loads it and tenders it back to the railroad for flatcar carriage. This arrangement has caused concern due to "the apparent opportunities for rebates and discrimination afforded by" it (J.S., App. B, p. 74).

Rules originally proposed by the Commission would have flatly prohibited this leasing practice (J.S., App. B, p. 70). However, after formal proceedings [2] "encompassing every aspect of TOFC operations" (J.S., App. B, p. 48), the Commission decided against "striking down the prevalent practice of trailer leasing by railroads" (J.S., App. B, pp. 133, 137). Instead, as Rule 7(a) [3] of the series of rules adopted on

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[2] *Ex Parte No. 230, Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, 322 I.C.C. 301 (J.S., App. B).

[3] 49 C.F.R. 500.7(a), which provides:

> Each railroad performing or holding out to perform TOFC service shall publish, post, and file tariffs (itself or through an agent) which shall contain in clear and explicit terms all of the rates and charges for and the rules governing the leasing of equipment to any person using its TOFC service (whether by the railroad itself or by any person affiliated with or controlled by the railroad or any agents of the railroad), and other special services or practices, including charges for pickup and delivery service when such

the basis of these proceedings to ensure that TOFC service would be available to all members of the shipping public on an equal basis and without discrimination, the Commission directed the publication in tariff form of all rates and rules governing the leasing of equipment by a railroad or its affiliate to any person utilizing the railroad's TOFC services. The Commission reserved consideration of more drastic measures, in the hope that the Rule would prove effective in discouraging abuses (J.S., App. B, p. 138).

As the basis for the Rule, the Commission explained that the railroads' practice of integrating the leasing of trailers with its Plan III service[4] is commonplace and widespread (J.S., App. B, pp. 60–65). As an example of how the practice works, it noted that Excelsior Truck Leasing Company, Inc., a wholly owned subsidiary of the Pennsylvania Railroad, owns trailers which it leases on behalf of the railroad to Pennsylvania's Plan III patrons, with the understanding that the trailers may be used only for Plan III TOFC shipments on the Pennsylvania (or on certain other railroads having specific interline arrangements with the Pennsylvania). Under the

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charges are in addition to line-haul transportation charges. Such tariffs shall also contain, in clear and explicit terms, all amounts to be paid to any shipper for the lease of any empty truck, trailer, or semitrailer (or the container portion of any truck, trailer, or semitrailer having a demountable chassis) when such empty equipment is being transported incidentally to its prior or subsequent use in TOFC service.

[4] Under Plan III, the railroad carries the trailer over the rail portion of the piggyback movement but does not offer door-to-door pickup or delivery service.

existing practice, there is no publication by the railroad of the charges or terms governing the use of these trailers, nor are they stated in the lease, such matters being the subject only of oral explanation by the railroad's agent (J.S., App. B, pp. 62–63). This failure to publish, the Commission found, permits railroads to offer "what amounts to exactly the same service in a variety of ways" with different costs to the shipper, some published and some not—a "state of affairs [which] places a premium on a shipper's having a sophisticated traffic department, capable of assessing the various available services, charges, and allowances, and of determining what combination offers the best transportation bargain in moving a particular shipment" (J.S., App. B, pp. 135–136)—and contains "potential seeds of discrimination" and "opportunities for abuse" (J.S., App. B, pp. 136, 138).

The three-judge district court upheld both aspects of the Commission's Rule: the requirement of publication of the leasing rates and rules, and the extension of the requirement to the railroads' leasing subsidiaries or affiliates. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 244 F. Supp. 955 (N.D. Ill.). Noting that Rule 7(a), in the context of the Commission's report, must be interpreted as extending only to the leasing of trailers by a railroad "for use in its own TOFC service, as part of the total transportation service supplied," the court found support for the Rule "in Section 6(1) of the Act, requiring full publication of all charges and privileges or facilities affecting the value of the service rendered to the shipper, and by Section 1(3)(a), defining rail

'transportation' to include the instrumentalities of carriage, irrespective of ownership." 244 F. Supp. at 971.

ARGUMENT

This appeal presents the sole question of the validity of one of several Rules—Rule 7(a)—promulgated by the Interstate Commerce Commission after a comprehensive investigation of piggyback service. Some of these Rules were struck down by the court below and are the subject of other pending appeals (n. 1, *supra*). The court, however, upheld Rule 7(a). The issue of the validity of this particular rule is narrow and severable, and, we submit, presents no substantial question warranting plenary consideration by this Court. Accordingly, this part of the judgment below should be affirmed.

1. Appellant contends that any service, such as the leasing of a trailer, which it performs prior to the tender of the trailer to it for rail shipment is not a transportation service (J.S. 11), and hence that the Commission has no jurisdiction to regulate its leasing arrangements. However, the Commission's Rule extends only to those leasing arrangements where a trailer leased by a railroad or a company controlled by it is used exclusively in conjunction with that railroad's TOFC service (J.S., App. A, p. 42; App. B, pp. 60–65)—a situation in which the leasing of the trailer is plainly an integral part of a transportation service[*]

[*] The Commission held (J.S., App. B, p. 137):

> We must point out here that we are not holding that the service which a carrier holds out to perform can only be ascertained from the actual words of its tariff. When a rail carrier offers a ramp-to-ramp TOFC service, ostensi-

and hence constitutes the provision of an "instrumentality of carriage" within the meaning of Section 1(3)(a).[5] Piggyback is a mixed rail-truck transporta-

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bly confined to the line-haul rail transportation of loaded highway trailers tendered at its terminal by shippers, but then proceeds to lease trailers, and to provide drayage, loading, and other "accessorial" services, we think that it is *in fact* holding out a complete door-to-door service. In such a case, all the services it provides become *transportation* services rather than mere accessorial services, and they are required to be the subject of its tariff publications. This, we think, disposes of the New York Central's argument that we have no authority to require the publication of accessorial services. To agree with the Central's position would be to allow any carrier, by self-imposed limitations contained in its tariffs, to designate what it considers to be transportation services and what it considers non-transportation services. This distinction is, we believe, a matter of fact and not one that can be imposed by fiat. The nature of piggyback—the fact that its advantage lies in its being a combination of rail and motor transportation—makes rail carriers tend to offer to their customers services which were traditionally provided only by motor carriers and which can physically be performed only with motor vehicles. Such services, we believe will normally be transportation services when offered in connection with TOFC transportation.

[5] *Eastern Central Motor Carriers Assn.* v. *Baltimore & Ohio R. Co.*, 314 I.C.C. 5, sustained *sub nom. Cooper-Jarrett, Inc.* v. *United States*, 226 F. Supp. 318 (W.D. Mo.), affirmed *per curiam*, 379 U.S. 6, is not to the contrary. The court there held only that trailers supplied by shippers (not, as here, by the railroad) for use in conjunction with Plan III service were containers rather than instrumentalities of transportation, and hence that Plan III did not contravene the Interstate Commerce Act's requirement that railroads furnish all the instrumentalities of transportation. 226 F. Supp. at 322. Thus, all that was decided in *Cooper-Jarrett* was that the Interstate Commerce Act does not compel a rail carrier to

tion service. Where the railroad holds itself out not only to perform the rail portion of the service, but to supply the trailer used in the motor portion, the trailer necessarily becomes a part or instrumentality of the transportation service offered, and the entire operation comes within the jurisdiction of the Commission."

2. Appellant contends that the refusal of the Commission to extend the coverage of Rule 7(a) to motor carriers and freight forwarders contravened the National Transportation Policy (49 U.S.C. preceding Section 1), which requires that regulation of the modes of transportation be "fair and impartial." (J.S. 13–14.) But this contention ignores the Commission's comprehensive rules governing motor carrier equipment leasing, which, among other things, absolutely prohibit motor common carriers from leasing trailers to shippers and require Commission approval of contract carrier rentals (49 C.F.R. 207.6). These rules go far beyond

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offer a complete door-to-door piggyback service. The question of the Commission's power to regulate such a complete service, here offered by the railroad through the leasing device, was not involved. There is an obvious distinction between those instrumentalities which the Interstate Commerce Act *requires* the carrier to furnish, and those instrumentalities which, if furnished voluntarily by the carrier, are deemed to fall within the Commission's regulatory powers.

[1] *Charges for Use of Trailers*, 49 M.C.C. 272, which appellant cites, held that where a motor carrier leases a truck trailer to a shipper for use in private and rail carriage, the lease of the trailer does not relate to for-hire carriage by the lessor motor carrier and therefore is not subject to regulation. 49 M.C.C. at 274, 275. Here, in contrast, the lease by the rail carrier is exclusively related to the performance of a rail service. At all events, *Charges for Use of Trailers* has been superseded by a rule which prohibits motor carriers' leasing of trailers, as we explain *infra*.

the mere requirement of publication imposed by Rule 7(a).[1] Hence, any attempt to extend the coverage of Rule 7(a), as appellant desires, would, at most, be an attempt "to satisfy some standard of paper equality." *American Trucking Assns.* v. *United States*, 344 U.S. 298, 315.

CONCLUSION

The judgment of the district court, insofar as it upholds Rule 7(a), should be affirmed.

Respectfully submitted.

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General Counsel.
ROBERT S. BURK,
Attorney,
Interstate Commerce Commission.

FEBRUARY 1966.

[1] To be sure, freight forwarders are not covered by these rules. But the Commission had no evidence before it that there was opportunity for abuse or other basis warranting extending Rule 7(a) to freight forwarders' leasing of trailers.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

THE NEW YORK CENTRAL RAILROAD COMPANY,

Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

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March, 1966

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 909

THE NEW YORK CENTRAL RAILROAD COMPANY,

Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

Statement

Appellant opposes the Motions to Affirm filed by the American Trucking Associations, et al., and jointly by the United States and Interstate Commerce Commission.

Appellant's case is adequately presented in its Jurisdictional Statement. Its appeal is directed to Rule 7(a) [C.F.R. 500.7(a)] promulgated by the Interstate Commerce Commission in *Substituted Service—Charges and Practices Of For-Hire Carriers And Freight Forwarders*, 322 I.C.C.

301 (1964) (J. S. App. B, p. 196), and affirmed by the three-judge district court in *Atchison, Topeka, and Santa Fe Railway Company, et al.* v. *U. S.*, 244 F. Supp. 955 (1965) (J. S. App. A, p. 42).

Appellees here, however, are also appellants seeking reversal of the same lower court decision with respect to Rules 2 and 3 [C.F.R. 500.2 and 500.3], such appeals now pending before this Court in Dockets No. 908 and No. 924.

While this particular appeal is addressed to Rule 7(a), the decision of the lower court with respect to Rules 2 and 3 requires as well remand to the Commission for a general review of the prescribed rules as a whole. The Commission, on remand, is to have an opportunity to clarify its intent with respect to Rule 7(a), as well as Rules 2, 3 and 5 (J. S. pp. 42, 44).

Appellees in this docket would be most pleased to compartmentalize the Commission's decision and the various rules. Rules 2, 3 and 7(a), and the legal problems inherent in each, however, are inseparable.

The Commission here was clearly obsessed with providing a scheme of social security for motor carriers, i.e., wherever they were not the most efficient form of transportation, service-wise or cost-wise, they were to be given free access to the most efficient mode, in this instance, railroad TOFC, which is priced on the *cost* of operating trailers over the highway (Plan III). See *Eastern Central Motor Carriers Assn., Inc.* v. *B. & O. et al.*, 314 I.C.C. 5, *aff'd sub nom., Cooper-Jarrett* v. *U. S.*, 226 F. Supp. 318, *aff. per curiam*, 379 U. S. 6 (1964).

TOFC, however, represents a new approach both in intermodal competition and intermodal coordination. No one element stands by itself, as the lower court properly concluded. That no one element *can* stand by itself is made manifest from the Commission's own opinion, for the very

authorities cited by the Commission in differentiating between—and yet approving—both Plan II (door-to-door service including all equipment) and Plan III (ramp-to-ramp service with accessories optional to the shipper) are inescapably applicable in determining what *is* a "transportation" service performed by a railroad acting in its normal capacity in possession of a shipper's cargo and what relationship, if any, arises or obtains *before* the railroad has received any cargo from the shipper and issued a bill of lading therefor, and *after* such cargo has been released and the provisions of the tariff and bill of lading (the contract of carriage) discharged.

To restate the matter simply, the railroads originally published a series of door-to-door TOFC rates, which in general were the same as those published by the motor carriers themselves on the same commodities and between the same points. These so-called Plan II rates, reflecting the exact level then being held forth by the motor carriers themselves, were "open tariffs" in the same sense as the Commission now refers to the railroads' Plan III tariffs as "open tariffs", but for obvious reasons, the motor carriers, appellees herein, had absolutely no incentive to seek use of the railroads' Plan II rates.

When the railroads, however, in late 1958, published Plan III rates reflecting the *cost* of motor carriage over the highways, the pattern of events which gave rise to this proceeding began to emerge.

Having failed in its many efforts to secure authority from the Congress to prescribe joint rates between rail and motor carriers, the Commission shifted to the next alternative. It declared by Rules 2 and 3 that a motor carrier was no different than any private shipper and thus should be able to utilize "open tariff" railroad Plan III rates. It follows, of course, that had the railroads not chosen to make full use of their inherent advantage of lower cost for inter-city transportation, this proceeding

would never have come about. Stripped of its excess verbiage and weighed entirely upon its results, the Commission's intent to permit the motor carriers full use of the railroads' inherent advantage of lower cost on long distance intercity operations in unmistakable.

This misguided approach will be exposed in detail by railroad appellees in Dockets No. 908 and No. 924 before this Court. As the District Court has observed, however, the proceeding "... must be remanded to the Commission in any event, for a general revision of the Rules as a whole ..." and it "will have an early opportunity to clarify its intent ... with respect to Rule 7 as well."

Rule 7(a) must, by its very nature, stand hand in hand with Rules 2 and 3. If the District Court's reversal of Rules 2 and 3 is affirmed and the proceeding remanded to the Commission, a reopening of the record will permit appellant to develop, by cross-examination and other means, the loopholes by which appellees A.T.A., et al., remain wholly unregulated in the area of trailer leasing to shippers through the use of their trailer-owning subsidiaries. These latter opportunities are completely ignored in appellees' Motions to Affirm.

Argument

Appellant's argument here is threefold:

(1) That the Commission has applied one line of cases to validate the right of rail carriers to publish complete door-to-door TOFC rates and yet publish, at the same time and between the same points, lower ramp-to-ramp TOFC rates where the shipper has the option of providing the frills: trailers, drayage, and loading of cargo. Appellant agrees with these authorities, but the same citations have been ignored on the subject of trailer leasing;

(2) That the Commission itself has previously declared trailer leasing as *per se* a non-common carrier function, having no place in common carrier tariffs; and

(3) That the Commission and the lower court have, contrary to the National Transportation Policy, disregarded the *actual* discrimination created by Rule 7(a), as demonstrated by uncontradicted evidence of record.

I.

The Commission's Theory By Which It Distinguishes Between And Yet Approves Both Plans II And III Commands The Decision That Leasing Of Trailers By Railroads Or Their Subsidiaries Is A Non-Common Carrier Function.

Appellee ATA contends that appellant's definition of a non-common carrier function would permit a common carrier to decide for itself what is or is not a "transportation" function under the Act and draw its tariffs accordingly. This is sophistry. The sole distinction urged by appellant here is that the common carrier obligation of transportation does not arise until the cargo itself has been tendered into the possession of the carrier, a principle which has been clearly established in a number of leading decisions, none of which appellees touch upon here and none of which would lead to the conclusion feared by appellees. *Pennsylvania Railroad Company* v. *P.U.C.O.*, 298 U. S. 170, 174-175 (1936); *Pennsylvania R. Co.* v. *M. McGirr's Sons Co.*, 287 F. 334, cert. denied, 262 U. S. 743 (1933); *Walling* v. *Baltimore Steam Packet Company*, 144 F. 2d 130 (1944).

Pennsylvania Railroad Company v. *P.U.C.O.*, *supra*, and *Walling* v. *Baltimore Steam Packet Company*, *supra*, were, in fact, cited by the Interstate Commerce Commission in

affirming the rights of the railroads to publish, at one and the same time, Plan II TOFC door-to-door rates and lower Plan III ramp-to-ramp rates, the distinction being that:

> "... the transportation subject to regulation under the Act has been held by the Supreme Court to begin 'when merchandise has been placed in the possession of a carrier' ".

Eastern Central Motor Carriers Assn. v. *B. & O., supra*, p. 47.[1]

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[1] On March 11, 1966, Division 2, issued its decision of February 23, 1966, in *Allowances For Trucking Baled Cotton, Ark., Okla., Texas*, 326 I.C.C. 335 (1966). The 2-1 decision is noted as one of general transportation importance and is thus subject to reconsideration by the entire Commission. The matter at hand, however, concerned, among other things, the legality of the respondent railroads' practice of granting allowances for private motor carrier services to and from points not served by the railroads themselves.

The Division's discussion on this point is illuminating:

> "The parties hereto differ as to the meaning of the words 'service connected with' as contained in section 15(13). In *Walling* v. *Baltimore Steam Packet Co.*, 144 F. (2d) 130 (1944), the court at 134 stated:
>
> > The phrase 'services in connection with' is used in sections 1(3), 6(7), and 15(13) of the Interstate Commerce Act * * * and, as so used, it has uniformly been construed to mean service rendered *while a shipment is in the custody and control of the carrier or service which the carrier is legally obligated to perform.* [Emphasis added.]
>
> "This decision was cited by the Commission in *Eastern Central M. Carriers Assn.* v. *Baltimore & O. R. Co.*, 314 I. C. C. 5 (1961), sustained in *Cooper-Jarrett, Inc.* v. *United States*, 226 F. Supp. 318 (W. D. Mo. 1964), affirmed per curiam, 379 U. S. 6, wherein at 47 it stated:
>
> > While section 1(3) defines "transportation" as including 'all instrumentalities and facilities of shipment or carriage, irrespective of ownership * * *, and all services in connection with the receipt, delivery * * * and handling of property transported,' and section 1(4) provides that it is the duty of a railroad 'to provide and furnish transportation upon reason-

(Footnote continued on following page)

(See similar conclusions reached in *Pennsylvania Railroad Co.* v. *U. S.*, 242 F. Supp. 890 (1965), affirmed on motion by this Court in Docket No. 511, October Term, 1965.)

II.

The Commission Has Itself Previously Held That Trailer Leasing Is *Per Se* Not A Common-Carrier Service And Has No Proper Place in Common-Carrier Tariffs.

In *Charges For Use of Trailers*, 49 M.C.C. 272 (1949), a motor carrier leased a trailer to a shipper. The shipper moved the trailer by rail and then over the highway by private carriage to its own plant at its own expense. At that point, the shipper loaded the trailer, returned it over the highway by private carriage, and thence via the railroad back to the motor carrier lessor. The motor carrier then delivered the contents of the trailer, as instructed, to points beyond the railhead. The arrangement for both the leasing and the carriage which followed upon return of the leased trailer to the motor carrier were fully set forth in that carrier's tariffs. The Commission ordered

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(Footnote continued from preceding page)

able request therefor,' the transportation subject to regulation under the act has been held by the Supreme Court to begin 'when the merchandise has been placed in the possession of the carrier.' *Pennsylvania R. Co.* v. *Ohio Utilities Comm.*, 298 U. S. 170, 174.

"Here, as indicated in appendix B, there is no requirement under the considered provisions that the cotton shipments be tendered to the respondents at the rail origin. The rail billing is obtained at the transit point after the movement has taken place. Such service cannot be reasonably construed as to take place while the shipment is in the custody, control, or possession of the carrier. Nor do we agree that under the facts of record it can reasonably be held to be a service which the carriers are legally obligated to perform." (pp. 347-348)

the carrier to remove the leasing provisions from its tariff stating that:

> "The leasing of trailers is not proper subject matter for tariff publication, and it is not made so by an attempt to connect it with the transportation service which respondent would perform beyond Providence." (49 M.C.C. at p. 275)

This unequivocal finding that trailer leasing is not a common carrier "transportation" function is wholly consistent with the distinction made by the Commission itself between shipper-furnished trailers (without any condition as to source) utilized in Plan III, and trailers furnished by the railroads themselves under their published tariffs in the use of the higher Plan II rates. In the latter case, the Commission defines Plan II trailers as "instrumentalities of transportation", but in the case of Plan III, the shipper-furnished trailers are defined as "articles of commerce", i.e., simply a larger-than-usual box provided by the shipper to protect its own cargo. *Forwarder Volume Commodity Rates, Chicago and New York,* 308 I.C.C. 455, *aff. Eastern Express, Inc.* v. *U. S.,* 198 F. Supp. 256, *aff. per curiam* 82 S. Ct. 640 (1962). Neither the Commission nor the lower court gave any recognition whatsoever to that distinction here.

The Motions to Affirm filed by ATA and the United States understandably do not undertake to explain or justify the failure of the Commission or the lower court to adhere to the same legal authorities here. The Commission's finding in *Charges For Use of Trailers, supra,* that trailer leasing was *per se* a non-common carrier function is relegated to mere mention by footnote (ATA p. 7, U. S. p. 7). In each footnote, it is simply suggested to the Court that the decision in question, while not necessarily erroneous, has, in fact, been superseded by subsequently

enacted regulations which prohibit motor carriers from any leasing of trailers whatsoever. Both appellees are well aware that such is not the case, but their sterile attempts to undercut *Charges For Use of Trailers, supra,* only emphasize the most serious part of appellant's complaint to this Court, i.e., the onerous restrictions visited upon appellant vis-a-vis the freedom of leasing which other regulated modes, particularly motor carriers, are permitted to retain.

III.

Rule 7(a) Discriminates In Favor Of Other Regulated Modes Contrary to The National Transportation Policy.

Rule 7(a) would govern leasing of equipment to any person "whether by the railroad itself or by any person affiliated with or controlled by the railroad or any agents of the railroad" (J. S., p. 138). Both appellees infer, through the footnotes earlier referred to, that leasing by motor carriers is, in fact, prohibited by the regulations published at 49 C.F.R. 207.6, such regulations stemming from Commission proceedings which were subsequently upheld in *American Trucking Associations* v. *United States,* 344 U. S. 298, 315 (1953). There are, however, a number of extremely significant differences between those proceedings and the resulting rules governing motor carrier operations, on the one hand, and Rule 7(a), as sought to be enforced here.

In the first place, as recognized in *American-Trucking Associations* v. *United States, supra,* the Commission opinion there under review, *Leasing and Interchange of Vehicles By Motor Carriers,* 52 M.C.C. 675 (1951), was based upon a record of flagrant and continuing violations of the Act. This Court briefly reviewed the well-established

evidence of such violations and the evils attendant thereto at 344 U. S. 302-305, 310, 311. On the other hand, the Commission itself here admits that:

> "The record before us is almost completely devoid of evidence that these opportunities for discrimination have been misused." (J. S., p. 137)

The Commission's record here is not "almost" completely devoid of evidence of wrongdoing in trailer leasing. It is wholly devoid thereof.

Secondly, the federal regulations (C.F.R. 207.6), so briefly noted in appellees' Motions to Affirm as authority for disregarding the Commission's previous holding in *Charges For Use of Trailers, supra*, do not, in fact, produce the suggested result. C.F.R. 207.6 does deal with rental of equipment by motor carriers to private carriers and shippers, and it does prohibit motor common carriers from renting equipment to private carriers or shippers without drivers. It does *not* extend, however, to affiliates or agents of the motor carriers, but provides only that:

> "Authorized common carriers shall not rent equipment without drivers to private carriers or shippers . . .".

The record here before the Commission affirmatively shows that designated freight forwarders, and affiliates, subsidiaries, or agents of designated motor common carriers are, in fact, leasing trailers to shippers for subsequent use in railroad Plan III service. (Commissioner Webb's dissent, J. S., pp. 179-180.) It was perhaps for that reason that Rule 14 proposed by the hearing examiners to govern the matter of trailer leasing extended only to the railroads themselves and not to subsidiaries, affiliates, agents, etc. (J. S., p. 195).

That the regulated motor common carriers have made extensive use of their freedom to form subsidiary corpo-

rations, which hold ownership to the transportation property utilized by the certificated highway carrier corporation itself, is clear from a number of the Commission's own decisions. To its credit, the Commission has, upon a number of occasions, expressed the opinion that the separation of the certificated carrier from its operating equipment, etc., through the use of subsidiary corporations, is not in the public interest, but its expressions therein have apparently been so lightly regarded that the Commission itself has since decided to tacitly approve the practice. Thus, after reviewing its past policy in such matters in *Roush—Control—Southern California Freight Lines,* 80 M.C.C. 573 (1959), the Commission stated that:

> "We remain convinced that the reasoning in the above-cited case is sound. However, practical considerations, including uniform standards and treatment for all carriers, require that we give further consideration to the matters involved.
>
> "There are no provisions of the Interstate Commerce Commission Act requiring our prior approval, or which inhibit any carrier, or persons in control of a carrier, from organizing at any time, separate noncarrier corporations to which a part, or all, of the properties of the operating carrier, except interstate operating rights, may be transferred. Similarly, in the instant case, should our approval of the transaction be conditioned to require elimination of the two noncarrier companies, there would be nothing to prevent Roush or the holding company from establishing, after consummation, new terminal and equipment holding companies and transferring to them the identical properties now held by the present terminal and equipment holding companies, thus avoiding the purpose of the condition. Thus, owing to our lack of jurisdiction over the organization and activities of such noncarrier entities under common control with

carriers, our attempts to control the creation or expansion thereof when presented as a part of a section 5 transaction have been largely ineffective.

"More important, however, is the fact that the imposition of this condition in a section 5 transaction results in the creation of inequality between various carriers. Stated differently, those carriers which attempt to abide by the spirit of the prohibition against noncarrier entities (and thereby forego the tax benefits derived therefrom) are being penalized therefor since their competitors may so operate without recourse by the Commission. Obviously, we should not foster such a situation.

"In view of the foregoing, we conclude that denial of the application because of the fact that control of the noncarrier equipment and terminal holding companies is a part of the transaction, or the imposition of a condition requiring their liquidation, in either instance does not effectively accomplish a necessary or desirable result as the law now stands." (pp. 588-589)

This separation of equipment ownership from the parent motor carrier corporation creates the most obvious loophole by which motor carriers, acting through their equipment-owning subsidiaries, remain free to lease trailers to shippers for subsequent use in TOFC service at whatever charge seems convenient at the moment. There are no existing rules whatever for controlling similar practices which this record shows are today being engaged in by regulated freight forwarders.

All railroads, motor carriers, water carriers, and freight forwarders were made respondents in this case. All, however, were not given the same treatment by the Commission, even though the uncontroverted evidence of record showed that all were engaging in the same practice of trailer leasing for subsequent use in TOFC service. The Com-

mission's action with respect to Rule 7(a) is, therefore, indefensible under the terms of the National Transportation Policy, which requires the "fair and impartial regulation of all modes of transportation".

Again, referring to the dissent of Commissioner Webb (J. S., pp. 179-180), this is no "paper inequality". It is a matter of vital financial importance to this appellant, and this Court should require the Commission to review and decide the matter upon the basis of the entire record.

CONCLUSION

Appellant submits that the questions posed are of extreme public importance and require plenary consideration by this Court. The Motions to Affirm should be denied.

Respectfully submitted,

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March, 1966

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

NEW YORK CENTRAL R. CO. *v.*
UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 58. Decided June 12, 1967.

PER CURIAM.

The motion of American Trucking Association, Inc., et al., to be added as parties appellee is granted.

The motion to affirm is granted and those portions of the judgment of the District Court from which appellant is appealing are affirmed.